90-357

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PETER D. PETERSON, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a new federal law, which unilaterally amends long-term contracts to which the United States is a party, solely for the purpose of saving money, violate the Due Process Clause of the Fifth Amendment to the United States Constitution?

2. Does a new federal law, which unilaterally amends and materially changes the terms of existing contracts between the United States and petitioner water districts effect an uncompensated taking of plaintiffs' private property interests in violation of the Just Compensation Clause of the Fifth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

In the Ninth Circuit Court of Appeals, five separate appeals were consolidated. All plaintiff-appellants in that consolidated appeal are the petitioners herein. They are Peter D. Peterson, Patricia Peterson, Jeffrey Shimizu, Paul R. Minasean, as Trustee of the Amy Peterson Trust, James Peterson Trust, and the Michael Peterson Trust, Dunnigan Water District, Central Valley Water Project Association, Sacramento River Water Contractors Association, Westside Water District, Kanawha Water District, Arvin-Edison Water Storage District, Southern San Joaquin Municipal Utility District, Panoche Water District, San Luis Water District, Lower Tule River Irrigation District, Delano-Earlimart Irrigation District, Catherine Stevens, and Laverne Stevens Siebert. The respondents to this petition are the United States of America, United States Department of Interior, the Secretary of the Department of Interior, and the Commissioner of the Bureau of Reclamation of the United States of America. The final party is Natural Resources Defense Council, intervenor-appellee in the court below.

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JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, review of which is sought in this petition, was filed on March 14, 1990, and amended on May 11, 1990. A petition for rehearing was filed by the water districts and denied by the Court on May 31, 1990 (App. D). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Due Process Clause and Just Compensation Clause of the Fifth Amendment to the United States Constitution. Statutory provisions at issue are those of the Reclamation Reform Act of 1982, codified at 43 U.S.C. § 390aa, *et seq*. The full text of the relevant provisions are reprinted in App. G.

STATEMENT OF THE CASE

By this action, numerous water districts and individual water users challenge the constitutionality of Section 203(b) of the Reclamation Reform Act of 1982 (RRA), Pub. L. No. 97-293, 43 U.S.C. § 390aa, *et seq.*

Long-term contracts between the United States and petitioner water districts, effective prior to the adoption of the RRA, provide for delivery of water at fixed rates. The fixed rate applies to water delivered to land owned by a single irrigator up to 160 acres, and to leased land without limit. At the time of the RRA's enactment, Congress recognized these contractual provisions were consistent with prior reclamation law. App. at H-13, App. at I-4. *See also* App. at I-21, 22, 23.

In contrast, under RRA, Section 203(b), more commonly known as the "Hammer" Clause, App. at I-22, petitioners are confronted with a Hobson's choice: they must either amend their contracts to conform to the RRA's "discretionary provisions," Sections 203 through 209,[1] or else they must begin paying the federal government full cost for water delivered to leased lands in excess of 160 acres. Either way, they are stuck with much higher costs, despite their long-term, fixed-cost contracts.

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[1] The United States will charge an "operation and maintenance" rate significantly higher than the original contract rate for water delivered to lands owned and/or leased up to a combined total of 960 acres, and charge a much higher "full cost" rate for water delivered to lands leased in excess of 960 acres. 43 U.S.C. § 390ee.

Petitioners maintain that the Due Process Clause requires the federal government to abide by its contractual commitments like any other party, unless altering the contract is *necessary* to an important public purpose—a circumstance absent here. (Here, the purpose is to fatten the federal fisc.) Petitioners further argue that by depriving water districts of water at the contract price, the government has taken private property in violation of the Just Compensation Clause.

The fundamental purpose of the Reclamation Act of 1902 was to promote development of the West by providing water resources which would enable agriculture to flourish. App. at H-42, App. at K-1. To facilitate settlement of the West, Congress decided to provide water at rates inadequate to repay the full capital cost of the supplying project during the term of the contract. *See City of Fresno v. State of California*, 372 U.S. 627, 631 (1963). Agricultural development which would have been marginal or impossible without the subsidies became profitable because of them. App. at K-1, 2, App. at H-16. Congress created a water service system based on long-term contracts designed to provide stability and predictability to the users. App. at K-3-12, 13-14. Maximum water rates were set low enough to provide an incentive for farmers to make the high investment required for irrigation. App. at K-3-12.

Bureau officials promoting utilization of project water met resistance from farmers in California's Central Valley, many of whom successfully farmed more than 160 acres and were unwilling to sacrifice their so-called excess land for water. App. at L-3, 4. To assuage their concerns, which threatened to retard project development, bureau officials explained that bureau contracts

would provide water at fixed prices for 40 years. App. at L-3, App. at L-10, 11. They further explained that the acreage limitation provisions of federal reclamation law applied only to lands owned outright, not to leased lands, and that the contracts would place no limitation on the delivery of water to leased lands. App. at L-3, 4. Based upon these representations, water districts were formed where they did not already exist, water distribution systems were developed and obligations were incurred to finance their construction, landowners within the water districts expended funds to make their land suitable for irrigation farming, and water service contracts with the United States were executed. App. at L-15, 16.

Typical of these contracts is the Lower Tule River Irrigation District water service contract. App. at J. A number of its provisions are exemplary of those which give rise to the water districts challenge to Section 203(b). They are:

Article 2. "This contract shall be effective from the date first hereinabove written and shall remain in effect for a period of forty (40) years . . . . "

Article 5(a). "The contracting officer will, on or before February 15 of each calendar year, by written notice, notify the District of the rates of payment to be made by the District for all water to be delivered to it pursuant to this contract during the ensuing year, but in no event shall the rates so announced be in excess of three dollars and fifty cents ($3.50) per acre-foot for Class 1 water and one dollar and fifty cents ($1.50) per acre-foot for Class 2 water."

Article 7(f). "The rights to the beneficial use of water furnished to the District pursuant to the terms of Article 3

and other applicable provisions of this contract and any renewal thereof shall not be disturbed so long as the District shall fulfill all of its obligations under this contract and any renewal thereof."

Article 18(a). "No water made available pursuant to this contract shall be furnished to any excess lands[2] as defined in Article 20 hereof unless the owners thereof shall have executed valid recordable contracts in forms prescribed by the United States. . . . "

Article 20(a). "As used herein the term 'excess land' means that part of the irrigable land within the District in excess of one hundred and sixty (160) acres held in the beneficial *ownership* of any private individual, whether a natural person or a corporation." (Emphasis added.)

Article 21. "In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, Articles 18, 19, and 20 of this contract will no longer be of any force or effect, and, in the event that the Congress amends the excess land provisions or other provisions of the Federal reclamation laws the United States agrees, *at the option of the District*, to negotiate amendments of appropriate articles of this

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[2] Pursuant to the contracts "excess lands" are lands owned in excess of 160 acres, or 320 acres for husband and wife, which have not been placed under a "recordable contract." This is a contract entered into between the landowner and the secretary. Under law in effect at the time water districts entered into their water service contracts, the "recordable contracts" were to provide that the landowner would dispose of his "excess land" at a price to be approved by the secretary. 43 U.S.C. § 390ii(a). If the excess land was not disposed of by the landowner within ten years, the Secretary would have the power to sell the land.

contract, all consistently with the provisions of such repeal or amendment." (Emphasis added.)

In summary, each contract provides that (1) the United States will provide a specified quantity of water to specified delivery points; (2) the agreement is long-term, not to exceed 40 years; (3) the contract was executed pursuant to the June 13, 1902, Reclamation Act, as amended and supplemented at the time the contract was executed; (4) the water district and landowners within the districts will comply with existing reclamation law; (5) the water district will levy charges and assessments sufficient to cover the rates for water service, and through elections, landowners within the water district will use their land as security; (6) the rates for water service are fixed; (7) water will not be delivered to ineligible lands; (8) the right to beneficial use of water will continue so long as the water district fulfills its obligations; and (9) amendments to excess land provisions of reclamation law will not be made applicable to the contract unless, at the option of the water district, an amendment to the contract is negotiated.

Notwithstanding, this last provision, Section 203(b), makes the RRA's excess lands amendments applicable to the water districts without their consent. How is this accomplished? By the RRA amending the definition of "excess lands" to mean "landholdings" in excess of 960 acres, whether owned or leased. Pub. L. No. 97-293, §§ 203(b), 204, 209, 96 Stat. 1265-67 (1982). Congress did this even though the water districts have an express contractual right to deliver water at the contract rate to eligible lands within their respective boundaries.

Pursuant to the pre-RRA water service contracts, the only ineligible land to which water cannot be delivered is land in excess of 160 acres "held in the beneficial ownership of any private individual" unless the landowner has executed a recordable contract agreeing to sell excess land at a price not to exceed the approved, appraised value of such excess land. The sale must occur within a period of 10 years from the date of the execution of the recordable contract. App. at J-39. The contracts, and more importantly, prior reclamation law, contain only these excess lands restrictions and absolutely no restrictions on the delivery of water to otherwise eligible land which is leased.

In enacting the RRA, Congress acknowledged that unilateral amendments to existing contracts would raise serious legal questions (App. at I-11, 12, App. at H-13), and that amendment could only be made with the consent of districts. App. at I-24, App. at H-13, *see* 43 U.S.C. § 390cc(d). Nevertheless, the RRA redesigns not only federal reclamation law, but also contracts based on prior law. App. at H-17. Section 203(b) provides:

> "Any district which has an existing contract with the Secretary as of October 12, 1982, which does not enter into an amendment of such contract as specified in subsection (a) of this section shall be subject to Federal reclamation law in effect immediately prior to October 12, 1982, as that law is amended or supplemented by sections 209 through 230 of this title. *Within a district that does not enter into an amendment of its contract with the Secretary within four and one-half years of October 12, 1982, irrigation water may be delivered to lands leased in excess of a landholding of one hundred and sixty acres only if full cost . . . is paid for such water as is assignable to those lands leased in excess of such landholdings of one hundred*

and sixty acres. . . . " (Emphasis added; citations omitted.)

The effect of the emphasized language in the above quote is to raise the price of water delivered to lands leased in excess of 160 acres from the rate specified in the water districts' respective water service contract to the "full cost." *See* 43 U.S.C. § 390ee(a)(3). The difference between contract rate and full cost is significant. App. at H-19. The coercive effect of Section 203(b) is aggravated by the fact that in present economic and farm circumstances, 160 acres cannot profitably be farmed, a reality of which Congress was aware at the time it enacted the new law. App. at I-19, 22, App. at H-39, 45.

None of the water districts involved in this litigation has amended its water service contract subsequent to the enactment of the Reclamation Reform Act of 1982. Therefore, if the water districts remain under the old reclamation laws, water can be delivered to land leased in excess of 160 acres only if full price is paid for such water, in violation of their contractual rights.

The RRA was perceived as a way to achieve "great potential for cost recovery," and as a means of eliminating what some perceived as unjustified subsidies for landowners. App. at H-18, 19, App. at I-11. Whatever the RRA's intent, the only effect of the "Hammer" Clause is to funnel more money to the federal government. No environmental benefit will result. No mass migration from crowded cities to the countryside will occur. No new family farms will be established. Unilaterally raising the price of federal water Congress is not going to reform modern agriculture and attain the Jeffersonian agrarian, bucolic ideal.

In short, many districts did not initially seek federal water. They were encouraged by a multitude of governmental representations which led them to expect to be able to irrigate their lands with water provided at the contract price for the contract term. In reliance on these promises, they spent millions building irrigation works. The RRA renders their investments much less valuable. It will force many of them to sell their land. Even small landowners will be detrimentally affected; leased lands are, of course, owned by someone.

Petitioners' complaint sought, *inter alia*, a declaration that the "Hammer" Clause is unconstitutional. The United States Court of Appeals for the Ninth Circuit affirmed the trial court's summary judgment in favor of the government. The federal issues on which review is sought in this Court were first raised in the complaint, and were subsequently raised at each stage of the proceedings. The decision of the court below, review of which is sought, directly concerns the two federal issues raised in this petition: whether the government's unilateral abrogation of contracts by enforcement of Section 203(b) violates the Due Process or the Just Compensation Clauses of the Fifth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND INVOLVES IMPORTANT ISSUES OF LAW WHICH SHOULD BE RESOLVED BY THIS COURT

Supreme Court Rule 10.1(c) lists among considerations governing review on certiorari the circumstances

when a United States Court of Appeals has decided an important question of law which has not been, but should be, settled by this Court or when a United States Court of Appeals has decided a federal question in a way that conflicts with an applicable decision of this Court. Both of these grounds for review are present in this case.

I

THE NINTH CIRCUIT FAILED TO EMPLOY THE APPROPRIATE STANDARD, FOR DETERMINING WHETHER A NEW FEDERAL LAW UNILATERALLY AMENDING CONTRACTS TO WHICH THE UNITED STATES IS A PARTY, VIOLATES THE DUE PROCESS CLAUSE

The first step in a due process analysis is to determine whether there is a property right that is protected. *Peterson*, 899 F.2d at 807 (citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986)), App. at A-20, 21. Water districts possess such property rights; they possess contractual rights for delivery of water at contract rates to eligible lands within their respective boundaries. The Ninth Circuit Court of Appeals ignored settled law requiring this finding.

Once it has been determined that a property right does exist, the second step under the Due Process Clause is to determine whether the challenged regulation impermissibly impairs that right. Once again the Ninth Circuit tap danced around the precedent from this Court providing the analytical standard for making this determination. In this case, because the subject contractual obligations are those of the United States and because the only purpose served by the "Hammer" Clause is saving money for

the United States, Section 203(b) should have been found to violate the Due Process Clause.

A. Water Districts Possess Express Contractual Rights Which Are Impaired by Operation of Section 203(b)

It is well-settled that the United States, "as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. at 52 (citations omitted). In this case, the United States entered into contracts that grant to water districts the right to deliver water at the contract rate to eligible lands within the districts' respective boundaries. The sole limitation imposed by law on that right and incorporated into the contracts was that water could not be furnished to any "excess lands." At the time the United States undertook its contractual obligations "excess lands" were defined to mean irrigable lands within a district in excess of 160 acres held in the beneficial *ownership* of any private individual, whether a natural person or a corporation. App. at J-24. The water service contracts also provide that the right to the beneficial use of water furnished to the water districts pursuant to the water service contracts "shall not be disturbed so long as the district shall fulfill all of its obligations under this contract and any renewal thereof." App. at J-5.

The Ninth Circuit concluded, however, that the rights water districts seek to protect are implied rights. App.

at A-27. To the contrary, water districts seek to protect the express contract rights to deliver water at the contract rate to all eligible lands except those which are excess. App. at J-21, 22.

These express contract rights were recognized by Congress on a number of occasions when debating the RRA. Report No. 97-458 of the House of Representatives states:

> "[T]he Committee also recognizes that there are in existence valid contracts entered into in full compliance with the law which govern the obligation of the district and its members to the United States. The Committee believes that, where possible, the United States should be held fully bound to its contracts and that it would be inappropriate as a matter of public policy, if not of law, for the Congress to unilaterally change a district's contract to impose upon it an obligation different than that to which it is presently committed." App. at H-13.

These express contract rights were also confirmed by Section 203(b) itself, a portion of which water districts challenge. The first sentence of Section 203(b) recognizes the districts' contract rights and provides:

> "Any district which has an existing contract with the secretary as of October 12, 1982, which does not enter into an amendment of such contract as specified in subsection (a) of this section shall be subject to Federal reclamation law in effect immediately prior to October 12, 1982, as that law is amended or supplemented by sections 209 through 230 of this title." (Citations omitted.)

Significantly, Congress "effectively ratifie[d]" these preexisting contract rights, calling for the rate paid for water delivered to eligible lands leased in excess of 160 acres to remain unchanged until four and one-half years after the effective date of the RRA. App. at I-23. Nevertheless, the Ninth Circuit concluded that water districts do not have a vested property interest in delivering water at the contract rate to eligible lands leased in excess of 160 acres. This is inconsistent with the congressional recognition expressed in the legislative history of RRA and in Section 203(b) itself. In addition, the Ninth Circuit's interpretation of water districts' contractual rights makes the second sentence of Section 203(b), the "Hammer" Clause, meaningless and is contrary to the rule of statutory construction that statutes are to be interpreted so as to not make superfluous or meaningless any word or clause. *Bird v. United States*, 187 U.S. 118, 124 (1902).

B. Section 203(b) Violates the Due Process Clause Under the Applicable Standard of Review

Although the Ninth Circuit recognized that "some limitations" exist affecting the United States' power to enact subsequent legislation affecting its own contractual arrangements (App. at A-23), it did not consider the appropriate standard expressed by this Court by which congressional enactments impairing contractual obligations of the United States should be judged. It is clear from the opinions of this Court that in this analysis it is necessary to distinguish between cases in which a congressional enactment impairs obligations created by contracts to which the United States is not a party, and cases

in which a congressional enactment impairs contractual obligations of the United States. Because the application of Section 203(b) results in an abrogation of contractual obligations of the United States, this Court has implied that it can be upheld only if the United States can demonstrate that the impairment of the water service contracts is reasonable and necessary to serve an important public purpose, which could not be achieved by less drastic means, *see United States Trust Co. v. New Jersey*, 431 U.S. 1, 30-31 (1977), and under no circumstances can abrogation be upheld if its purpose is just to save the United States Treasury money. *Bowen, supra.*

Water districts acknowledge that the constitutional principles developed under the Contract Clause, Article 1, Section 10, Clause 1, "no state shall . . . pass any . . . law impairing the obligation of contracts," are not embodied in the Fifth Amendment Due Process Clause limitations on the power of Congress to impair preexisting contracts between private parties or between private parties and a local or state government, *see Pension Benefit Guaranty Corp. v. R. A. Gray & Company*, 467 U.S. 717, 732-33 (1984), and that normally a congressional enactment which adjusts the burdens and benefits of economic life is afforded a presumption of constitutionality. *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1, 16 (1976). However, well-established, venerable authority of this Court establishes that when a congressional enactment abrogates contractual obligations of the United States, the standard by which the enactment is to be measured under the Due Process Clause is heightened.

In *United States Trust v. New Jersey, supra,* this Court held that a state could not retroactively repeal a statutory bond covenant relied upon by bond purchasers. The covenant at issue was part of bistate legislation which authorized a compact authority to acquire a railroad. The Supreme Court declined to greet the statutory amendment with the deference ordinarily accorded social or economic regulation because the state's "self interest [was] at stake." 431 U.S. at 25-26. The Court held that in such circumstances a regulation would violate the Contracts Clause unless the government could demonstrate that impairment of its contractual obligation was "reasonable and necessary to serve an important public purpose." *Id.* In reaching its conclusion that the statutory amendment violated the Contracts Clause, the Court stated:

> "The determination of necessity can be considered on two levels. First, it cannot be said that total repeal of the covenant was essential; a less drastic modification would have permitted the contemplated plan without entirely removing the covenant's limitations on the use of Port Authority revenues and reserves to subsidize commuter railroads. Second, without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit. Appellees contend, however, that choosing among these alternatives is a matter for legislative discretion. But a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well . . . . In the instant

> case the State has failed to demonstrate that repeal of the 1962 covenant was . . . necessary." *Id.* at 29-30 (footnotes omitted).

Although *United States Trust* involved application of the Contract Clause to state legislation, the same considerations warranting the higher level of scrutiny that applied in that case exist in this case; the challenged statute substantially impairs a contractual obligation of the sovereign which enacted the challenged statute. In fact, to develop the "dual standard of review" applied in *United States Trust*, the Court relied upon Fifth Amendment cases on which water districts in this case rely. *Id.* at 26 n.25. Therefore, it is appropriate that the standard articulated by this Court in *United States Trust* be employed in the Due Process analysis required in this case. Section 203(b) should be upheld only if the United States can demonstrate that its application is reasonable and necessary to achieve an important public purpose that could not be accomplished by less drastic modification of the United States' contractual obligations. *See United States Trust v. New Jersey*, 431 U.S. at 30-31. The Ninth Circuit failed to employ this standard.

The constitutional principles applicable to situations in which Congress has acted to modify contractual obligations of the United States were succinctly summarized by this Court in *National Railroad Passenger Corp. v. Atchison, Topeka, and Santa Fe Railway Company*, 470 U.S. 451, 471 n.24 (1985), where the Court stated:

> " 'There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate

> the substance of its own engagements . . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.' Perry v United States, 294 US 330, 350-351 . . . (1935).
>
> "Thus, the Court has observed that in order to maintain the credit of public debtors, see Lynch v United States, 292 US 571, 580 . . . (1934), and because the 'State's self-interest is at stake,' United States Trust Co. v New Jersey, 431 US 1, 26 . . . (1977), the Government's impairment of its own obligations perhaps should be treated differently. See also Allied Structural Steel Corp. v Spannaus, 438 US 234, 244, note 15 . . . . (1979)."

While it is true that none of this Court's decisions have applied the heightened standard of review in reviewing congressional enactments impairing the contractual obligations of the United States, this Court has consistently held that Congress does not have "the power to repudiate its own debts, . . . simply in order to save money." *Bowen*, 477 U.S. at 55 (citing *Perry v. United States*, 294 U.S. 330, 350-51 (1935); *Lynch v. United States*, 292 U.S. 571, 576-77 (1934)). Although the Reclamation Reform Act in its entirety may serve important public purposes, the only purpose served by Section 203(b) that can be gleaned from the record concerning its enactment was the elimination of what was perceived by some in Congress as an unjustified subsidy, thereby saving

money.[3] Under this Court's previous cases, abrogation of a contractual obligation by the United States for this purpose is impermissible. *Perry v. United States*, 294 U.S. at 352-53; *see also Lynch v. United States*, 292 U.S. at 579.

Moreover, each of the public purposes furthered by the Reclamation Reform Act of 1982 could have been achieved without Section 203(b) by simply awaiting the

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[3] At the time of Section 203(b)'s enactment virtually nothing was said concerning its purpose. Throughout the history of the two parallel House and Senate bills that culminated in the enactment of the Reclamation Reform Act of 1982, there was virtually no mention of any provision that resembled Section 203(b). The only exception was an amendment offered by Senators Lugar and Proxmire, which was soundly rejected by the Senate because of questions concerning the permissibility of congressional abrogation of contractual rights. App. at I-12, 14, 15-17. Section 203(b) did not appear in the bill until it emerged from the conference committee. App. at H-29. The only mention of Section 203(b) in the presentation of the conference bill to the Senate is contained in a letter from the Commissioner of Reclamation to Senator James McClure. Therein, it is stated: "The Conference Report, however, will produce additional revenues over the original projections for the House bill, because there are increased incentives for districts to amend their contracts and come under the new pricing provisions. In addition, all districts will be subject to new pricing after 4 1/2 years from enactment." App. at I-25. Similarly, the House presentation contains only limited reference to Section 203(b). App. at I-21-23. From these references, it is apparent the only purpose of the "Hammer" Clause is to reduce the "subsidy" for water delivery to lands leased in excess of 160 acres. App. at I-21, 22, App. at H-21, 22. *Lynch v. United States*, 292 U.S. 571.

expiration of the water districts' contractual obligations.[4] Because the sole purpose of the challenged provision was to save money for the United States, Section 203(b) would not survive a heightened scrutiny standard for determining a Due Process Clause violation for congressional enactments which impair the obligations created by contracts to which the United States is a party. The Ninth Circuit failed to recognize this standard although this Court has employed it for evaluation of Contract Clause violations, and by implication has indicated its propriety for evaluation of Due Process Clause violations. This Court should grant certiorari to settle whether this heightened scrutiny standard should be applied under the facts of this case.

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[4] Whatever the purpose to be served by the Reclamation Reform Act of 1982, it is apparent that the purpose could have been accomplished through less drastic impairment of the United States' contractual obligations. If the purpose of the act was to reform the reclamation law by eliminating landholdings larger than 960 acres, the size of a landholding which is "eligible" under the new law, 43 U.S.C. § 390dd, the purpose could have been achieved by enacting a statute which provided that "full cost" had to be paid for water delivered to land leased in excess of 960 acres, rather than land leased in excess of 160 acres. Alternatively, the purposes of the act could have been achieved by providing positive incentives to encourage water districts to elect to come under the new law rather than adopting a coercive "Hammer" Clause. *See United States Trust Co. v. New Jersey*, 431 U.S. at 29-30.

II

THE NINTH CIRCUIT FAILED TO RECOGNIZE THE FULL SCOPE OF PETITIONERS' PROPERTY INTERESTS AND CONSEQUENTLY ENGAGED IN AN INADEQUATE TAKINGS ANALYSIS UNDER THE PRECEDENTS OF THIS COURT

The Ninth Circuit Court of Appeals, in finding that the districts' water service contracts with the United States are not vested property rights, has created a conflict with a number of this Court's decisions.

The Ninth Circuit misconceived the position of petitioners in stating: "[t]hey argued that they have 'a reasonable investment-backed expectation' to receive water at subsidized rates and that this expectation amounts to a property interest that is protected by the Fifth Amendment." App. at A-34. The court then stated that petitioners offered no authority "for the proposition that a constitutionally protected property interest can be spun out of the yarn of investment-backed expectations." *Id.* The court went on to find no property right exists. App. at A-36. This finding ignores prior Supreme Court analysis and calls for correction by this Court.

Petitioners actually argued that their property interest was created by their *contracts*, not their reasonable investment-backed expectations. Petitioners described their reasonable investment-backed expectations to indicate not the *basis* of their right, but its *scope*. Receiving water at the contract price was not a mere expectancy, but a contractual *right*.

In *Lynch v. United States*, 292 U.S. at 579 this Court made clear that

> "the Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." (Footnote omitted.)

Hence, the question which should have been resolved by the Ninth Circuit was not whether the district's water service contracts amounted to property rights. *Lynch* demonstrates that they surely do. Rather, the proper question should have been what is the scope of the property interests embodied in these water service contracts.

This Court, as well as the highest courts of various states, has established that the scope of property interests qualifying for protection under the Just Compensation Clause is not limited to physical objects or the title thereto. The United States Supreme Court has defined the interests subject to constitutional protection as all those rights inhering in an individual's relation to the thing owned, including the rights of possession, use, and disposal. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Protected property interests include not just fee interests and lease holds, but "every sort of interest the citizen may possess." *Id.* Specific property interests that have been recognized under the Just Compensation Clause have included the use of air space, *United States v. Causby*, 328 U.S. 256 (1946); flowage easements, *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961); liens, *Armstrong v. United States*, 364 U.S. 40 (1960);

public access easements, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); the right to exclude third parties, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); the right to exclude the general public, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); and the right to develop property. *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. 1989). Especially in recent years, this Court has demonstrated a commitment: "to what might be termed an 'unbundling' of property interests for purposes of applying the legal criteria in takings cases." Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 357 (1988). This commitment was explicitly illustrated in *Hodel v. Irving*, 481 U.S. 704 (1987). That case involved a challenge to a federal statute providing that certain fractional property interests in Sioux Indian land must revert to the tribe upon the owner's death, and could not be passed on to survivors. In finding that the statute violated the Just Compensation Clause, this Court fully considered the extent of the property right that was at issue: "Of course, the whole of appellees' decedents' property interests were not taken . . . . There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right." *Id.* at 715. The fractional element of petitioners' property rights, which is the subject of this action, is the "right to rely" on the full scope of their property interests embodied in the terms of the districts' water service contracts as expressly stated therein, and as interpreted by the United States when negotiating these contracts. Specifically, these reliance rights amount to

long-term fixed water rates and delivery of water to leased lands without limitations.

In *Kaiser Aetna v. United States*, this Court provided the proper analytical dimensions for delineating the scope of districts' "right to rely." *Kaiser Aetna* involved the development of a marina. The Army Corps of Engineers (Corps) was notified of the development project, but the Corps acquiesced. The project went ahead. Later, the Corps required the marina developers to obtain permits for any future dredging, and required public access be allowed to the now-constructed marina. The Court acknowledged the Corps had power to refuse to allow dredging and even to demand public access. However, the Court held that the Corps' acquiescence or consent to the project led to an expectation in the property owners, which right could not be taken without just compensation. "While the consent of [government] officials . . . cannot 'estop' the United States, . . . it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for." 444 U.S. at 179 (citations omitted).

The Ninth Circuit did not bother to use this analytical approach. It simply found no property rights existed.

If the *Kaiser Aetna* analysis had been employed, the Ninth Circuit would have, and should have, concluded that conditions on the scope of rights could have been imposed by the government in water service contracts with the districts just as the Corps could have conditioned its dredging approval in *Kaiser Aetna* when it originally issued its permit. Instead, the United States

Bureau of Reclamation made conscious decisions to induce landowners to form water districts and to make significant investments required for irrigation farming or to change their method of irrigation. App. at K-1, 2, App. at L-2, 3, 4. It was specifically represented to prospective water purchasers that the acreage limitation provisions of the reclamation law applied only to lands owned within a district and did not place any limitation on the delivery of water to leased lands. Then long-term contracts were signed which, instead of imposing conditions or even reserving the ability to condition, actually gave up any rights to impose conditions or amend the contracts except at the option of the districts. *See* App. at J-26.

This Court should direct the Ninth Circuit and other lower courts to employ the proper analysis as expressed in *Kaiser Aetna*. Otherwise, citizens of this country, even after expending fortunes in reliance on contracts made with the United States, will not be able to depend on the promises made in those contracts. Repercussions of such facile governmental repudiation of their contractual responsibilities may be solemn, affecting international trade, balance of payments, and our very economy. Interpreting the Fifth Amendment's breadth as encompassing a "right to rely" sets this nation apart from third world countries like Iraq which have no reservations about repudiating their contracts and appropriating their citizens' property.

Thus, a *Kaiser Aetna* takings analysis would have determined that the fruition of the districts' expectancies in fixed water rates and unlimited leasing rights had become so important as to redefine the scope of the districts' contract rights. Consequently, this redefined

stick in their bundle of property rights became their "right to rely," and must be condemned or paid for by the government. *Kaiser Aetna,* 444 U.S. at 179. This Court should grant certiorari to direct lower courts to recognize and employ the *Kaiser Aetna* standard for takings.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals has allowed the United States to unilaterally abrogate the water service contracts of petitioner water districts. The decision ignored the proper standard for determining whether an abrogation violates the Due Process Clause of the United States Constitution. The United States enforcement of Section 203(b) of RRA accomplishes only one purpose: it saves the United States money. Such a purpose denies petitioners their due process rights.

The decision also effects a taking of petitioners' property rights in their water service contracts. This Court has instructed that the scope of a property right is defined in part by the expectancies created by governmental representations. *Kaiser Aetna*. The Ninth Circuit failed to apply this takings standard in evaluating petitioners' rights by simply ruling petitioners had no property interests to be taken. To the contrary, the rationale of *Kaiser Aetna* and other recent cases of this Court demonstrates that petitioners' "right to rely" was taken without just compensation.

Review is necessary to resolve these important questions and petitioners, accordingly, respectfully urge this Court to grant this petition for writ of certiorari and

reverse the judgment of the Ninth Circuit Court of Appeals.

DATED: August, 1990.

Respectully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER D. PETERSON, et al., *Plaintiffs,* v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., *Defendants.*	
DUNNIGAN WATER DISTRICT, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA; DONALD P. HODEL, in his capacity as SECRETARY OF THE DEPARTMENT OF THE INTERIOR; C. DALE DUVALL, in his capacity as COMMISSIONER OF THE BUREAU OF RECLAMATION OF THE UNITED STATES OF AMERICA, *Defendants-Appellees,* and NATURAL RESOURCES DEFENSE COUNCIL, INC., *Defendant/Intervenor-Appellee.*	No. 87-2681 D.C. No. CV-85-1644-RAR ORDER AND AMENDED OPINION

PETER D. PETERSON, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

ARVIN-EDISON WATER STORAGE DISTRICT; SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT; PANOCHE WATER DISTRICT; SAN LUIS WATER DISTRICT; LOWER TULE RIVER IRRIGATION DISTRICT; DELANO-EARLIMART IRRIGATION DISTRICT; TULARE IRRIGATION DISTRICT; CATHERINE STEVENS ZAHN; LAVERNE STEVENS SIEBERT,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, in his capacity as SECRETARY OF THE DEPARTMENT OF THE INTERIOR; C. DALE DUVALL, in his capacity as COMMISSIONER OF THE BUREAU OF RECLAMATION OF THE UNITED STATES OF AMERICA,

Defendants-Appellees,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Defendant/Intervenor-Appellee.

No. 87-2780
D.C. No.
CV-86-0882-RAR

PETER D. PETERSON, et al., *Plaintiffs-Appellants,* v. UNITED STATES OF AMERICA, et al., *Defendants-Appellees,* and NATURAL RESOURCES DEFENSE COUNCIL, INC., *Defendant/Intervenor-Appellee.*	No. 87-2781 D.C. No. CV-86-238-RAR

Appeal from the United States District Court
for the Eastern District of California
Raul A. Ramirez, District Judge, Presiding

Argued and Submitted
January 10, 1989—San Francisco, California

Filed March 14, 1990
Amended May 11, 1990

Before: William A. Norris, John T. Noonan, Jr. and Edward Leavy, Circuit Judges.

Opinion by Judge Norris

* * *

COUNSEL

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ORDER

Following a petition for rehearing filed by the Water Districts, the opinion in this case, filed on March 14, 1990, *Peterson v. United States Dep't of the Interior*, slip op. at 2761, is hereby amended as follows:

The final sentence of the slip opinion should be modified to read: "The summary judgment in favor of the government and the Natural Resources Defense Council is AFFIRMED."

Page 2779, lines 23-27. The following sentence should be omitted: "Subsidized water was delivered to J.G. Boswell Company, which farmed 133,228 acres, to the Southern Pacific Land Company, which farmed 106,680 acres, and to seven other corporations that each farmed in excess of 10,000 acres in the valley." The citation to the Congressional Record that follows this sentence should remain.

Page 2788, lines 5-8. The first full sentence should be changed so that "the entire 106,680 acres leased by the Southern Pacific Land Company and the 133,228 acres leased by J.G. Boswell Company" is replaced by "lands leased by large corporations that consist of hundreds of thousands of acres."

OPINION

NORRIS, Circuit Judge:

In these consolidated cases, we are asked by various public water agencies in California's Central and Solano Valleys (the "Water Districts") to declare unconstitutional a provision of the Reclamation Reform Act of 1982 which interferes, they argue, with their contractual right to receive subsidized water from federal reclamation projects for distribution to agricultural users in their districts.[1] This appeal raises important questions of Congress's ability to reshape federal water policy and to decide who shall receive federally subsidized water from the government's reclamation projects in the western states.

I

Each of the Water Districts entered into a long-term contract in the past 30 years with the Department of the Interior, Bureau of Reclamation ("the Bureau") to receive water from two vast systems of federally-owned and operated reservoirs, dams and canals: the Central Valley Reclamation Project and the Solano Project.[2] Under these

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[1] Several landowners who receive reclamation water from the water districts are also named as plaintiffs in these cases. The landowners do not claim that they have any right to reclamation water that is not dependent on the water districts' contractual right to the water. Accordingly, we refer to the plaintiffs collectively as the "Water Districts."

[2] Most of the contracts are for 40-year terms and are due to expire in the mid-1990s. Many, however, do not expire until after the year 2000, and one does not expire until 2026.

contracts the federal government agreed to provide water to the Water Districts at a fixed rate for the contract period. Although each District was charged a different rate for the water it received, all of the contract rates represent a significant government subsidy. In exchange, the Water Districts agreed to distribute the water to eligible lands within their jurisdictions. The only express eligibility requirement contained in the contracts was that no water could be provided to any farm in excess of 160 acres whether owned by a natural person or a corporation. Because the contracts did not expressly prohibit the Water Districts from providing water to farms of more than 160 acres if the land was leased rather than owned, the Water Districts have for many years delivered subsidized water to farms consisting of thousands of acres of leased land, as well as to small farms complying with the acreage limitation.

The Reclamation Reform Act of 1982, 43 U.S.C. §§ 373(a); 390aa-390zz-1; 422(e); 425(b); 485(h); 502 (1982 & West Supp. 1989) ("the RRA") amended federal reclamation law in three important ways: (1) it increased the acreage limitation from 160 to 960 acres;[3] (2) it closed the "leasing loophole" by making the acreage limitation expressly applicable to holdings that were leased as well as owned; *see* 43 U.S.C. §§ 390dd, 390ee, and (3) it raised the price of reclamation water to a level that reduced, but

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[3] The RRA made one exception to the new 960-acre limitation: Large business entities, defined as those benefiting more than twenty-five persons, could not receive reclamation water at subsidized rates for any land owned or leased in excess of 320 acres. 43 U.S.C. § 390ee(2) & (3).

did not eliminate, the federal subsidy. *See* 43 U.S.C. § 390hh.

The provision of the RRA in dispute in this litigation is section 203(b), also known as the "hammer clause." The hammer clause puts water districts to an election. They are permitted to amend their contracts to conform to the requirements of the RRA, which means a 960-acre limitation applicable to all lands, whether owned or leased, and an increased, but still subsidized, price. If Water Districts choose not to so amend their contracts, they are permitted to deliver water to leased lands in excess of 160 acres provided they pay the government's "full cost" of delivering the water. 43 U.S.C. § 390cc(b).[4]

In these cases, the Water Districts claim that application of section 203(b) to their existing water contracts violates the due process clause and the taking clause of the fifth amendment.[5] The district court granted the government's motion for summary judgment on both

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[4] The term "full cost," as used in the Act, means "an annual rate . . . that shall amortize the expenditures for construction properly allocable to irrigation facilities in service, including all operation and maintenance deficits funded, less payments, . . . with interest on both accruing from October 12, 1982." 43 U.S.C. § 390bb(3)(A).

[5] The fifth amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Water Districts also brought claims against the United States based on 42 U.S.C. § 1983, the ex post facto clause, the equal protection clause and the doctrine of equitable estoppel. The Water Districts do not appeal the district court's dismissal of these claims.

claims, and the Water Districts now appeal. We affirm the district court's decision that neither the due process nor the taking clause prevents Congress from limiting the volume of subsidized water that the Water Districts can deliver to leased lands under their pre-existing contracts with the Bureau of Reclamation.

II

The starting place for understanding the 1982 amendments to the federal water reclamation law is nearly one hundred years ago when the federal government initially became involved in developing irrigation systems for the western states. The opening of the West to farming through the harnessing of its waters provides not only fascinating history but also necessary background to the constitutional questions raised by these cases.

The final westward migration of the late 1800s resulted in an enormous demand by the settlers for irrigation systems.[6] The western states, however, lacked the means to finance the enormous systems of dams, reservoirs, and canals needed to regulate and distribute water from the western rivers and snow melt. *See California v. United States*, 438 U.S. 645, 663 (1978). Responding to the pressing demand for federal assistance in funding water reclamation projects, Congress passed the Reclamation

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[6] As early as 1891, settlers in the western states organized annual Irrigation Congresses, where delegates met to discuss their water needs and to urge Congress to fund federal reclamation and irrigation projects. *See generally* Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L.J. 477, 481-85 (1955).

Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371-600(e)(1982)).

With the Reclamation Act of 1902, Congress committed itself to the task of constructing and operating dams, reservoirs, and canals for the reclamation of the arid lands in 17 western states. *California*, 438 U.S. at 650.[7] The projects were to be built on federal land and the actual construction and operation were to be in the hands of the Secretary of the Interior. *Id.* at 664.

The Congress that enacted the Reclamation Act of 1902, however, had far greater expectations for the program than simply an increase in the West's agricultural production. With the Reclamation Act, Congress created a blueprint for the orderly development of the West, and water was the instrument by which that plan would be carried out. *See Invanhoe Irrigation District v. McCracken,*

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[7] Of all the federal reclamation projects undertaken, the Central Valley Project is the largest. In 1958, the Supreme Court described the CVP as follows:

> [The Central Valley Project] was born in the minds of far-seeing Californians in their endeavor to bring to that State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind. Failing in its efforts to finance such a giant undertaking, California almost a quarter of a century ago petitioned the United States to join in the enterprise. The Congress approved and adopted the project, pursuant to repeated requests of the State, and thus far has expended nearly half a billion dollars.

Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 280 (1958).

357 U.S. 275, 292 (1958). Congress was particularly concerned that the reclamation projects not fuel land speculation in the West or contribute in any way to the monopolization of land in the hands of a few private individuals.[8] The congressmen and senators who sponsored the bill described it as a necessary measure to guard against the rampant land speculation of the late 19th century and to create in its stead small family farms and homesteads for the rapidly increasing population. Representative Newlands, the author of the 1902 Act, stated that "the very purpose if this bill is to guard against land monopoly and to hold this land in small tracts . . . to give to each man only the amount of land that will be necessary for the support of a family. . . . " 35 Cong. Rec. 6734 (1902). Similarly, Senator Hansbrough of North Dakota, a co-sponsor, introduced the reclamation bill into the Senate by stating: "Mr. President, the purpose of this measure is to assist in providing homes for the rapidly increasing population of the country." *Id.* at 1383.

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[8] The legislative history of the 1902 Act is replete with references to the anti-monopoly and anti-speculation goals of the bill and to Congress's desire that the federally subsidized water be used to create landholding patterns consistent with its vision of an agrarian society of family-owned farms. Frank Mondell of Wyoming described the bill as "a step in advance of any legislation we have ever had in guarding against the possibility of speculative land holdings and in providing for small farms and homes on the public land, while it will also compel the division into small holdings of any large areas . . . in private ownership which may be irrigated under its provisions." 35 Cong. Rec. 6677 (1902); *see also* Taylor, *supra* note 6, at 484-85; Taylor, *National Reclamation in Imperial Valley: Law v. Policy*, 11 Ecology L.Q. 125, 125-26 (1983).

Congress's goals in enacting the Reclamation Act of 1902 have never been in doubt. As the Supreme Court observed in *Ivanhoe*, Congress clearly intended the federal reclamation projects to promote the growth of an agricultural society in the West "by limiting the quantity of land in a single ownership to which project water might be supplied." 357 U.S. at 292. And as our circuit has said, the Reclamation Act of 1902 was animated by three primary goals: "to create family-sized farms in areas irrigated by federal projects . . . , to secure the wide distribution of the substantial subsidy involved in reclamation projects and [to] limit private speculative gains resulting from the existence of such projects." *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1119 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

To accomplish these goals, Congress established eligibility requirements for those who could receive water from any of the federal reclamation projects funded under the Act. First, and most importantly, Congress provided that "[n]o right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner." 43 U.S.C. § 431. It so happens that 160 acres was also the limit on the amount of public land made available to individuals and families under the Homestead Acts,[9] reflecting Congress's view at the time of the appropriate size for a "family farm." See Sax, *Federal Reclamation Law* § 120.1, at 210 in 2 Water & Water Rights (R. Clark ed. 1967).

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[9] *See* Homestead Act of 1891, ch. 561, § 5, 26 Stat. 1097 (repealed 1976).

Second, Congress prohibited the sale of project water to any landowner who was not "an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of such land." 43 U.S.C. § 431.

Finally, in a series of significant amendments to the Act, Congress established additional controls over land speculation by requiring users of reclamation water who owned land in excess of 160 acres to enter into "recordable contracts" with the Secretary of the Interior, in which they would agree to sell their excess land within ten years. *See, e.g.*, Omnibus Adjustment Act of 1926, 43 U.S.C. § 423(e).[10] The sale price was set by the Secretary and reflected the value of the land prior to construction of the reclamation projects, thus removing a windfall to those who had acquired large landholdings before an irrigation project was completed. In exchange, during the ten years prior to sale, the excess land could receive project water.

These three restrictions are evidence that:

> [f]rom the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest

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[10] The 1926 amendment was preceded by a 1914 amendment which provided:

> [T]he Secretary of the Interior shall require the owners of private lands [receiving water from a reclamation project] to agree to dispose of all lands in excess of the area which he shall deem sufficient *for support of a family* on the land in question. . . .

43 U.S.C. § 418 (1982) (emphasis added).

> number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. It has been applied to public land opened up for entry under the reclamation law as well as privately owned lands, which might receive project water.

Ivanhoe, 357 U.S. at 292.

There is no question that the Reclamation Act "was designed to benefit people, not land." *Id.* at 297.

Originally, the Department of the Interior was given responsibility not only for constructing the reclamation projects, but also for administering the distribution of water to agricultural users in a project service area. In 1926, however, Congress amended the reclamation laws to remove from the Department the primary responsibility for distributing water and monitoring its use. Omnibus Adjustment Act § 46, 43 U.S.C. § 423e. Instead, the Secretary of the Interior was directed to enter into long-term water service contracts with irrigation districts organized under state law. It was left to the individual districts to execute subcontracts with the actual users of water and to deliver the water. Under this arrangement, the water districts, rather than the United States, had responsibility for ensuring that recipients of project water were complying with federal reclamation law, including the acreage limitation and excess-land sale requirement. *See Tulare*, 535 F.2d at 1094.

Although the Reclamation Act of 1902 had originally intended to recoup the costs of constructing and operating the projects through the sale of federally-owned

western lands, *see* 43 U.S.C. § 391, almost immediately the funds proved inadequate, and Congress had to restructure the program's financing. In a series of amendments to the Act, Congress provided that a portion of the capital costs of the projects, as well as a portion of their operating and maintenance costs, would be charged to the users. *See* 43 U.S.C. § 492 (enacted in 1914); 43 U.S.C. § 493 (enacted in 1924); 43 U.S.C. § 423(e) & (f) (enacted in 1926). However, Congress did not expect to recover all of the construction costs, nor did it expect to recover interest on any of the costs the federal government had incurred. For example, in the case of the Central Valley Project, it was recognized from the outset that the irrigation water payments would be insufficient to return more than a fraction of the allocation construction costs. *See City of Fresno v. California*, 372 U.S. 627, 631 (1963).

The Department's practice of entering into long-term contracts at fixed rates only highlighted the fact that the projects were incapable of paying for themselves. By 1982, the Congressional Budget Office calculated that the United States would in the next five years spend roughly $3.8 billion on Bureau of Reclamation water projects, but would recoup only $275 million as a result of existing reclamation repayment policies. Cong. Rec. S 8318 (daily ed. July 15, 1982) (statement of Sen. Proxmire).

As the program has been administered by the Department of the Interior over the course of this century, it has become clear that this vast federal subsidy has been flowing to many farming operations which in no way resemble the small, family-owned farms envisioned by

the enacting Congress. Although observers were optimistic during the early years of the projects about the program's ability to break up large landholdings and the Department's willingness to enforce eligibility requirements, *see* Taylor, *Imperial Valley, supra* note 8, at 126, by the 1950s the water districts and the farming interests had found ways to circumvent the 160-acre limitation and the forced sale provision.

One of the primary means for avoiding these two eligibility requirements of the reclamation law was the practice of leasing.[11] *See* 128 Cong. Rec. 16,596 (1982) (statement of Sen. Exon) ("Leasing has historically been one of the principal devices used by large landowners for avoiding the acreage limitations in the past."). The reclamation laws themselves made no mention of whether leased lands were or were not entitled to receive reclamation water; the laws only provided that reclamation water could not go to any lands in common ownership in excess of 160 acres. The water service contracts that the Bureau entered into with the water districts tracked the language of the 1902 Act and thus did not include any reference to leased lands. Because the water service contracts permitted the water districts to purchase as much water as needed for eligible lands within their districts and allowed the water districts to determine which lands were eligible, water districts bought far more water than

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[11] Technically ineligible lands also could receive reclamation water by sinking wells into the underground water supply into which much of the reclamation water ultimately flowed. *See Taylor, Excess Land Law: Calculated Circumvention,* 52 Calif. L. Rev. 978, 987-89 (1964).

could be used by 160-acre, family-owned farms in their service areas. The excess water was provided by the water districts to farms whose lands held in common ownership did not exceed that 160-acre limitation, but whose operators also controlled leased lands of many thousands of acres. Although the Department of the Interior was aware that unlimited leasing was being used to circumvent the 160-acre limitation, it took no action to prevent the practice.[12] As to the residency requirement, the Department ignored it altogether after 1926.[13]

The "leasing loophole" was freely exploited by the water districts and large farming operations for many decades. By 1981, it was clear that the original blueprint for the development of the western lands embodied in the reclamation laws had not been met and had, in fact, become obsolete. The 160-acre family-owned farm was no longer an efficient, or even viable, means of farming in the West. S. Rep. No. 97-373, 97th Cong., 2d Sess. 9 (1982). Moreover, only a fraction of the farms actually receiving reclamation water were of that size. By 1981, only 23% of the land receiving federal reclamation project water was farmed in operations of 160 acres or less. 128 Cong. Rec. 16,599 (1982) (document submitted by Sen. Exon). Three percent of the farming operations receiving reclamation

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[12] The Bureau did ban leaseback arrangements, the most "flagrant use of leases to circumvent the excess land provisions of the law." Huffaker & Gardner, *The "Hammer" Clause of the Reclamation Reform Act of 1982*, 26 Nat. Resources J. 41, 59 (1986).

[13] *See also* Kelley, *Acreage and Residency Limitations in the Imperial Valley: A Case Study in National Reclamation Policy*, 23 S.D.L. Rev. 621, 622 (1978).

benefits controlled 30% of all of the irrigated lands in the program. 128 Cong. Rec. 16,421 (1982) (statement of Sen. Proxmire). The largest farms, which comprised 20% of the irrigated acreage in the program, averaged 3,721 irrigable acres. 128 Cong. Rec. 16,599 (1982). The greatest individual beneficiaries of the practice of unlimited leasing were large corporate farming operations located in California's San Joaquin Valley. 128 Cong. Rec. 8810 (1982) (statement of Rep. Weaver).

The federal subsidy to these large farming operations was enormous. The contract price of water delivered to the Water Districts ranged from $2.00 to $7.50 per acre foot. In contrast, the actual cost to the United States of providing this water was between $8.43 and $55.61. The value of the water subsidy provided to Southern Pacific Land Company alone was estimated at $6 million per year. 125 Cong. Rec. 24,342 (1979) (statement of Sen. Nelson). In this litigation, the Department of the Interior has calculated the average present value of the irrigation subsidy for recipients of water from the Central Valley Project to be $1,850 per acre.

In 1977, in response to a preliminary injunction ordering the Bureau of Reclamation to promulgate rules to implement the acreage limitation and excess land provisions, *see National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976), the Department of Interior moved to close the leased land loophole. Its proposed rule stated that "[n]o person or legal entity shall be entitled to lease more than 160 acres of land served by federal water provided pursuant to the reclamation laws." 42 Fed. Reg. 43,044, 43,047 (1977). Those regulations never went into effect, however, because they

were superseded by Congress's enactment of the Reclamation Reform Act of 1982.

With the Reclamation Reform Act, Congress redefined completely who could receive subsidized reclamation water and the price they would pay. The price charged for reclamation water was increased to keep in line with increased operating and maintenance costs. At the same time, the 160-acre limitation was discarded as incompatible with modern farming techniques. In its place, Congress authorized the sale of project water at the new, though still subsidized, rates to "qualified recipients" for landholdings up to 960 acres and to "limited recipients" for landholdings up to 320 acres. 43 U.S.C. § 390ee(a). Qualified recipients include individual citizens, resident aliens, and "any legal entity established under State or Federal law which benefits twenty-five natural persons or less." 43 U.S.C. § 390bb(9). Limited recipients are legal entities that benefit more than 25 natural persons. 43 U.S.C. § 390bb(7). This change results in a six-fold expansion of the acreage limitation for qualified recipients, and a two-fold expansion for limited recipients.

As part of the Reclamation Reform Act, Congress closed the "leasing loophole." The RRA now defines a landholding as the "total irrigable acreage of one or more tracts of land situated in one or more districts owned or operated under a lease which is served with irrigation water pursuant to a contract with the Secretary." 43 U.S.C. § 390bb(6). Although the Act does not bar the Department of Interior from providing water altogether to qualified recipients for use on leased lands that exceed the 960-acre limitation, the recipients are required to pay

the "full cost" for any such water. 43 U.S.C. § 390ee(a). Finally, the Act eliminates the never enforced residency requirement. 43 U.S.C. § 390kk.

In these cases, the Water Districts challenge the constitutionality of section 203(b) of the Act, the so-called "hammer clause." 43 U.S.C. § 390cc(a) and (b).[14] Section

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[14] Section 390cc(a) and (b) provide:

New or amended contracts.

(a) Generally.

The provisions of this subchapter shall be applicable to any district which—

(1) enters into a contract with the Secretary subsequent to October 12, 1982;

(2) enters into any amendment of its contract with the Secretary subsequent to October 12, 1982, which enables the district to receive supplemental or additional benefits; or

(3) which amends its contract for the purpose of conforming to the provisions of this subchapter.

(b) Amendment of existing contracts. Any district which has an existing contract with the Secretary as of October 12, 1982, which does not enter into an amendment of such contract as specified in subsection (a) of this section shall be subject to Federal reclamation law in effect immediately prior to October 12, 1982, as that law is amended or supplemented by sections 209 through 230 of this title [43 U.S.C.A. §§ 390ii to 390zz-1, 373a, 422e, 425b, 485h]. Within a district that *does not enter into an amendment of its contract with the Secretary within four and one-half years of October 12, 1982,* irrigation water may be delivered to *lands leased in excess of a landholding of one hundred and sixty acres only if full cost,* as

(Continued on following page)

203(b) gives the Water Districts the option of amending pre-existing contracts to conform to the RRA's new provisions, the most important of which are: the increased 960-acre limitation and the decreased subsidy for reclamation water. Those water districts that decline to exercise this option within the time prescribed may continue to receive water at the original contract price for delivery to land held in common ownership that does not exceed the 160-acre limit, but must pay "full cost" for any water delivered to *leased* landholdings of more than one hundred and sixty acres. All of the plaintiff Water Districts in this suit declined to amend their contracts and brought suit in federal court, claiming that the "hammer clause" violated the due process and taking clauses of the fifth amendment of the Constitution.[15]

III

The first step in both due process and taking analysis is to determine whether there is a property right that is

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> defined in section 390bb(3)(A) of this title, is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres: *Provided*, That the interest rate used in computing full cost under this subsection shall be the same as provided in section 390ee(a)(3) of this title.

(emphasis added).

[15] The Water Districts do not make a claim under the contract clause, article I, section 10, of the Constitution. It is settled law that the contract clause applies only to the several states and not to the federal government. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9 (1984).

protected by the Constitution. *See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment* ("Public Agencies"), 477 U.S. 41, 54-55 (1986); *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958). In *Public Agencies*, a takings case, the Court held that the contractual right at issue "did not rise to the level of 'property' " and "[could] not be viewed as conferring any sort of 'vested right.' " 477 U.S. at 55. Without a property right, there could be no "taking within the meaning of the Fifth Amendment." *Id.* at 55-56.

The Water Districts maintain that as a result of the water contracts they have a constitutionally protected property interest in the delivery of subsidized water to leased tracts of any size. They claim that the hammer clause, section 203(b), violates this right by restricting the size of the leased tracts that can receive subsidized water.

There is no question that the federal government, "as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Public Agencies*, 477 U.S. at 52 (citations omitted). Nonetheless, when interpreting the federal government's contractual agreements, we are guided by three paramount principles: First, " 'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless *surrendered in unmistakable terms.*' " *Id.* (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (emphasis added)). Thus, "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Id.* at 52 (citations omitted). Second, governmental contracts "should be construed, if possible, to

avoid foreclosing exercise of sovereign authority." *Id.* at 52-53. Third, governmental contracts should be interpreted against the backdrop of the legislative scheme that authorized them, and our interpretation of ambiguous terms or implied covenants can only be made in light of the policies underlying the controlling legislation. *See Darlington*, 358 U.S. at 87-88.

With these principles in mind, we consider the Water Districts' claim to a vested contractual right to receive water at the subsidized rate to deliver to leased tracts of more than 160 acres. The Water Districts' argument in support of this right proceeds along two tracks. First, the Water Districts contend that because Congress did not include in the Act an express provision reserving to Congress the right to amend the reclamation law's eligibility requirements, Congress's right to amend the water service contracts is limited. Second, the Water Districts argue that absent an express reservation of the right to amend the contracts in the controlling legislation itself, we look only to the language of the contracts themselves. The Water Districts claim that their contracts must be interpreted (1) as giving them an implied right to deliver subsidized water to leased tracts of any size, and (2) as including an express waiver by Congress of its right to amend the contracts without the Water Districts' consent.

A

We consider first the Water Districts' argument that Congress was required to reserve expressly the right to amend the reclamation law in the body of the statute

itself. Although it is true that there is no express provision in the statutory scheme retaining Congress's ability to amend, alter or repeal the provisions of the Reclamation Act, this silence cannot be construed as a waiver of any of Congress's powers. The sovereign's power to enact subsequent legislation affecting its own contractual arrangements endures, albeit with some limitations, unless "surrendered in unmistakable terms." *Public Agencies*, 477 U.S. at 52.[16]

It is true that a line of cases, beginning with the *Sinking-Fund Cases*, 99 U.S. 700 (1878), upholding legislation altering or repudiating the provisions of a government contract, has relied on the fact that the original statute included language reserving Congress's right to repeal, alter, or amend the act at any time. *Public Agencies*, 477 U.S. at 53-54; *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 467-69 (1985); *Sinking-Fund Cases*, 99 U.S. at 720. As the Supreme Court explained in those cases: "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments . . . as come within the just scope of legislative

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[16] The exercise of the "reserved power" is not absolute. The Court has recognized that Congress's power in this respect " ' has a limit' in that Congress could not rely on that power to 'take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' " *Public Agencies*, 477 at 55 (quoting *Sinking-Fund Cases*, 99 U.S. 700, 720 (1878)). Similarly, Congress does not have "the power to repudiate its own debts, . . . simply in order to save money." *Id.* at 55 (citing *Perry v. United States*, 294 U.S. 330, 350-51 (1935); *Lynch v. United States*, 292 U.S. 571, 576-77 (1934)).

power." *Sinking Fund Cases*, 99 U.S. at 720. However, nothing in those cases suggests that it is an absolute requirement that Congress expressly reserve in the controlling statute the right to amend the statute or governmental contracts entered under it. Rather, in the *Sinking-Fund* line of cases, the express reservation was simply deemed dispositive of the plaintiffs' claims that Congress could not amend their contracts. There is no indication that the cases would have been decided differently had the statutes been silent on this issue. In light of the fundamental principle that Congress always has the power to amend, repeal or ignore legislation passed by earlier congresses, *see Manigault v. Springs*, 199 U.S. 473, 487 (1905); *Sierra Club v. Froehlke*, 816 F.2d 205, 215 (5th Cir. 1987); *Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Commission*, 593 F.2d 1102, 1113 (D.C.Cir. 1978), we decline to read the *Sinking-Fund* line of cases as requiring that Congress expressly recite that it reserves the right to "repeal, amend or alter" legislation to preserve its fundamental right to do so. Finally, the recent statement by the Supreme Court that Congress must surrender its sovereign power "in unmistakable terms" before a court may find that Congress has yielded such power is entirely inconsistent with the requirement that Congress give notice in regulatory legislation that the regulations are subject to change. *Public Agencies*, 477 U.S. at 52.

B.

Nonetheless, we agree with the Water Districts that the absence of any express statement in the Reclamation Act of 1902 (and its amendments prior to 1982) requires

us to examine the water service contracts to determine whether Congress surrendered in clear and absolute language its right to impose express limitations on the size of leased tracts that could receive reclamation water.

We now address the Water Districts' argument that the contract language itself gives the Water Districts a vested right to deliver subsidized water to leased tracts of any size and contains an express waiver of Congress's power to amend the reclamation law in any way that interferes with that right. The specific contractual provisions that form the basis of the Water Districts' claim vary slightly in each contract. The following portions of the Lower Tule River Irrigation District water service contract, however, are exemplary of those provisions:

> Article 2. This contract shall be effective from the date first hereinabove written and shall remain in effect for a period of forty (40) years. . . .
>
> Article 5(a). The contracting officer will, on or before February 15 of each calendar year, by written notice, notify the District of all the rates of payment to be made by the District for all water to be delivered to it pursuant to this contract during the ensuing year, but in no event shall the rates so announced be in excess of three dollars and fifty cents ($3.50) per acre-foot for Class 1 water and one dollar and fifty cents ($1.50) per acre-foot for Class 2 water.
>
> Article 7(f). The right to the beneficial use of water furnished to the District pursuant to the terms of Article 3 and other applicable provisions of this contract and any renewal thereof shall not be disturbed so long as the District shall fulfill all of its obligations under this contract and any renewal thereof.

> Article 18(a). No water made available pursuant to this contract shall be furnished to any excess lands as defined in Article 20 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States. . . .
>
> Article 20(a). As used herein the term 'excess land' means that part of the irrigable land within the District in excess of one hundred and sixty (160) acres held in the beneficial ownership of any private individual, whether a natural person or a corporation.
>
> Article 21. In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, Articles 18, 19, and 20 of this contract will no longer be of any force or effect, and, in the event that the Congress amends the excess-land provisions or other provisions of the Federal reclamation laws the United States agrees, at the option of the District, to negotiate amendments of appropriate articles of this contract, all consistently with the provision of such repeal or amendment.

Expert of Record ("E.R.") Vol. IX, Tab 2, Exh. E.

The Water Districts claim that because Article 18(a) contains only one express restriction on the type of land that can receive project water, and that restriction applies only to land in excess of 160 acres held "in common ownership," their contracts with the Bureau give them an implied right to deliver water to farms of any size, as long as the farms are leased instead of owned. Thus, while acknowledging that they are expressly forbidden from delivering project water to forty acres of a 200 acre

family-owned farm, the Water Districts contend that Articles 18(a) and 20(a), when read together, give them an implied right to deliver subsidized water to lands leased by large corporations that consist of hundreds of thousands of acres. As further support for their claim to an implied right to the water, the Water Districts point to Article 21's statement that "the United States agrees, at the option of the District, to negotiate amendments of appropriate articles of this contract," which the Water Districts construe as an express relinquishment by the United States of its ability to interfere with this implied right.

We read the contracts differently. The Water Districts concede, as they must, that the contracts do not expressly authorize the delivery of water to leased tracts. Instead, the Water Districts proceed on the theory that it is *implicit* in the terms of their contract that they can provide reclamation water without limit to leased tracts and that Congress will not interfere with this implied right. On this basis, they claim to have a vested contractual right to continue to deliver subsidized water to leaseholds of any size, a right allegedly impaired by section 203(b). We take a different view. As the Supreme Court has stated when reviewing a similar claim to a vested right based on an implied contractual provision, the Water Districts' claim "lies in the periphery where vested rights do not attach." *Darlington*, 358 U.S. at 90.

The Supreme Court considered and rejected a similar due process claim to an implied contractual right against the government in *Darlington*, and its analysis controls. *Darlington* involved another federal subsidy, a mortgage

insurance program embodied in the 1942 National Housing Act, 56 Stat. 303, 12 U.S.C. § 1743, as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214, and the regulations issued thereunder. Congress enacted the program with the aim of making housing more accessible to veterans and their families. A corporation, which had entered into a federal contract to obtain mortgage insurance, rented apartments to transients, a use not *expressly* prohibited by the contract, controlling statute, or regulations promulgated thereunder. In fact, the only relevant requirement in force at the time the mortgage insurance contract was entered into was that the property be "designed principally for residential use." 358 U.S. at 85 (quotation omitted). Five years later, Congress enacted legislation expressly barring the rental of such housing units to transients. The corporation sued, asserting that the amendment amounted to an unconstitutional infringement of its contractual rights.

To determine whether a right to rent to transients could fairly be *implied* in the contracts, the Court turned to the legislation that had authorized the contracts. Review of the controlling statute, the National Housing Act, convinced the Court that the "legislation [was] passed to aid veterans and their families, not . . . to promote the hotel or motel business." *Id.* at 87 (footnote omitted). Congress's intention that the mortgaged properties be rented only as permanent dwellings pervaded the Committee reports and other legislative history, although the requirement was never made expressly. Because the legislative purpose of the Act was to provide permanent homes for families, and in particular, for veterans and their families, the Court declined to hold that

the plaintiff had an implicit right to engage in conduct that did not serve that purpose. The Court rejected the argument advanced by the dissent that Darlington's contract gave it a vested right to make rentals to any persons and in any manner that was not expressly prohibited by the statute or contract. *Id.* at 95 (Harlan, J., dissenting). Instead, the Court concluded that "[t]hose who do business in the regulated filed cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* at 91. By passing legislation barring rentals to transients, Congress was simply making explicit the policy underlying the legislation, thus "doing no more than protecting the regulatory system which it had designed." *Id.*

The similarities between the Water Districts' claim in this case and the claim rejected in *Darlington* are striking. The Water Districts contend that because they were not expressly prohibited by the Department in their contracts from providing water to leased land, they have a contractual right to do so which must be considered "vested" or immune from later regulations or statutory amendments. This argument was squarely rejected in *Darlington* as insufficient ground on which to base a claim to a vested right.

As in *Darlington*, the implied right asserted here clearly violates the spirit, if not the letter, of the reclamation laws which authorized such contracts. The reclamation projects were funded by the federal government with the express intent that the subsidized water be used to promote the development of family-owned farms. *See* discussion, *supra*, at pp. ___. Prior to the RRA, Congress had always required that land receiving reclamation

water be owned in nc larger than 160-acre parcels *and* that the owners of the land occupy it or reside in the neighborhood. The fact that the Department of the Interior ignored the residency requirement and turned a blind eye to the practice of large-scale leasing does not lessen the importance of these restrictions in the congressional scheme. Nor did the Department's lax enforcement policy over the years remove the ever-present possibility that Congress would buttress the reclamation laws "by subsequent amendments to achieve [its original] legislative end." *Darlington*, 358 U.S. at 91.[17]

In sum, the fact that the reclamation laws had as their *end* the dismantling of large landholdings in the West and the redistribution of the land to families, effectively undercuts the Water Districts' argument that they were given an implied right to deliver the water to farms regardless of size, as long as the land was not actually *owned* by the operator of the farm. To find a vested contract right with these facts, we believe, would seriously impair Congress's sovereign power to pass laws for the public welfare. Were we to accept the Water Districts'

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[17] The actions of the Department of the Interior are relevant, if at all, to an equitable estoppel claim against the United States. Although we express no opinion as to whether equitable estoppel could be invoked in this case because the Water Districts do not appeal the district court's dismissal of their estoppel claim, we note the equitable estoppel is infrequently applied against the government and then only in cases where there is "affirmative misconduct" by the government. *Wagner v. Director, Fed. Emergency Management Agency*, 847 F.2d 515, 519 (9th Cir. 1988) (quotation omitted).

argument, parties that enter into contracts with the government pursuant to such legislation could claim vested rights to engage in all conduct not expressly forbidden in the contracts. We do not believe that Congress must exhaustively proscribe conduct in a regulated field to prevent parties from claiming an "implied vested right" to engage in conduct found by later Congresses to be harmful to the public welfare.

Our rejection of the Water District's claim to a vested contract right finds further support in the Supreme Court's decision in *Public Agencies*. In that case, California and several of its public agencies brought suit against the United States, alleging a taking in violation of the fifth amendment as a result of a 1983 amendment to the Social Security Act, repealing a state's right to terminate its participation in the Social Security system. Because California had previously entered into an agreement with the federal government, which expressly provided that California could withdraw from the system, California claimed that section 418(g), as amended, amounted to a repudiation by the government of its contractual obligations.

The Supreme Court rejected this argument, reasoning:

> The termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in § 418 itself. The provision constituted neither a debt of the United States, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium. The termination clause was not unique to this Agreement; nor was it a term

> over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.

477 U.S. at 55 (citations omitted).

If anything, California had a greater claim to a vested right in *Public Agencies* than do the Water Districts in this case because in *Public Agencies* the federal government had incorporated in an agreement with the states an express promise that they could withdraw from the social security system. Nonetheless, the Court held that the contracts created no interests that were entitled to protection under the taking clause of the fifth amendment.

C

There is still an additional reason for not finding an implied vested right in the Water Districts' contracts. The contracts contain no language that can be construed as a "surrender[] in unmistakable terms" of the sovereign's ability to regulate the quantity of subsidized water that may be provided to leased farm lands. *Public Agencies*, 477 U.S. at 52. Article 21, which the Water Districts claim is a clear waiver of the federal government's sovereign power, cannot be so interpreted, especially if we follow the Supreme Court's dictate that governmental contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Id.* at 52-53.

Article 21 has two primary clauses. The first states that if Congress were to repeal the excess land provisions of the federal reclamation law, then the contracts would

be modified automatically to eliminate related provisions in the contract. The second clause of Article 21 provides that if Congress *amends* the excess land provisions or any other aspect of the reclamation law, the contracts will be modified "consistently with the provisions of such . . . amendment," and "at the option of the District."

The Water Districts argue that these two clauses of Article 21 make the contracts inviolable, absent a negotiated amendment between the parties. They claim that the two clauses "expressly deprive the United States of the power to make subsequent amendments of the law applicable to the contracts." Appellants' Opening Brief at 29. We read Article 21 differently.

In our view, the clause granting the Districts the option of renegotiating their contracts cannot reasonably be interpreted as a "surrender[] in unmistakable terms" of the sovereign's power to make changes in the federal reclamation laws. *Public Agencies*, 477 U.S. at 52. Such an interpretation would do violence to the principle that government contracts should be construed, whenever possible, "to avoid foreclosing exercise of sovereign authority." *Public Agencies*, 477 U.S. at 53. In light of this principle, we believe that a more reasonable interpretation of Article 21 is that it grants the Water Districts the option of renegotiating the terms of their contracts to conform to Congress's amendments to the excess land provisions of the reclamation law. This option does not, however, give the Water Districts the right to continue to receive reclamation water under the terms of the pre-existing contracts if those terms violate the newly amended law.

As we read Article 21, the Water Districts have a choice between renegotiating their contracts to bring them into conformity with the new law or withdrawing from the reclamation program. In other words, the Water Districts have the option of continuing to receive reclamation water but only under the terms of the new law. Thus, they can continue to receive and deliver water to holdings up to 160 acres, whether owned or leased, at the low price specified in their preexisting contracts, but they cannot continue to deliver water at the old price to holdings in excess of 160 acres.

Although we acknowledge that the language of Article 21 is not entirely clear as to its intended meaning, we believe that our reading of the ambiguous language is the only one that is reasonable in light of the Supreme Court's command that we interpret government contracts, whenever possible, to avoid foreclosing the exercise of sovereign authority. We also believe that our interpretation is reasonable in light of Article 21's own requirement that in the event of congressional amendment of the federal reclamation law, the Water Districts' actions must be "consistent[] with the provision of such repeal or amendment."

D

The Water Districts urge yet another line of reasoning in their effort to establish a vested property right in the contracts. They argue that they have a "reasonable investment-backed expectation" to receive water at subsidized rates and that this expectation amounts to a property interest that is protected by the fifth amendment. They

claim that their expectation of subsidized water was reasonable based upon the statutes then in effect and upon the representations "made by the United States during the negotiation, drafting, and execution of the water service contracts." Appellants' Opening Brief at 36. They also point to the investments that the Water Districts and property owners made, in reliance upon these representations, statutes, and contracts, and claim that section 203(b) destroys their reasonable expectation that they would continue to receive subsidized water for lands leased in excess of 160 acres.[18]

The Water Districts offer no authority for the proposition that a constitutionally protected property interest can be spun out of the yarn of investment-backed expectations. Their reliance upon *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) for this argument is misplaced. *Ruckelshaus* is authority for the proposition that once a constitutionally protected property interest is established, then a reasonable investment-backed expectation is one of several factors to be taken into account "when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.'" 467 U.S. at 1005. Whether a "taking" has occurred is the second step of the inquiry. Here, we do not reach that step because the Water Districts have failed to survive the first step, which is establishing that a property right exists. Thus, the Water Districts' reliance on *Ruckelshaus* is misplaced, leaving them with no support for the curious proposition

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[18] Once again, the Water Districts' argument takes on the flavor of an equitable estoppel claim against the government. *See supra* note 17, at ___.

that investment-backed expectations can give rise to a constitutionally protected property interest.

E

In sum, because the Water Districts have no vested property right to buy reclamation water for delivery to leased lands, the restrictions imposed by section 203(b) do "not effect a taking within the meaning of the Fifth Amendment." *Public Agencies*, 477 U.S. at 56. For the same reason, the Water Districts' due process claim also must fail. *See Darlington*, 358 U.S. at 91 ("The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning."). In the absence of a vested property right, the Water Districts can prevail on their due process claim only if they establish that section 203(b) is arbitrary and irrational. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). This they have failed to do.

We agree with the district court that section 203(b) of the Reclamation Reform Act is rationally related to a legitimate governmental purpose. The provisions of the Act, and its legislative history,[19] clearly demonstrate that

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[19] *See, e.g.*, 128 Cong. Rec. 8809 (1982) (statement of Rep. Clausen) ("The hope of the committee is that upward revision of the acreage limitation will enhance the economic viability and productivity of the modern family farm. . . . "); H.R. Rep. No. 458, 97th Cong., 2d Sess. 34 (1982) (statement of Rep. Miller) (Reforms "will reduce unjustified taxpayer subsidies to large scale farmers while preserving benefits to the intended beneficiaries of the Reclamation program – the small farmer.").

Congress's primary concerns were not with the federal budget,[20] but rather, with the promotion of small farming operations, equitable distribution of water under modern farming conditions, and water conservation. *See* Section II *supra* at pp. ___.

To these ends, Congress increased the size of farms that could receive reclamation water to 960 acres (whether leased or owned) and raised the price of reclamation water to reflect more accurately its true cost to the government. Section 203(b) authorized the Water Districts to amend their contracts to take advantage of the 960-acre limitation, albeit at a potentially higher, but still subsidized, rate than that provided in their contracts. The Water Districts were not required to amend their contracts because any water district that wanted to maintain the 160-acre limitation and lower contract price was left free to do so. Section 203(b), the so-called hammer clause, simply provided that those who elected to continue under the original contracts could no longer continue to deliver subsidized water to leased tracts of any size. Section 203(b) requires the Water Districts to choose between continuing under previous federal water policy, but without the "leasing loophole" tolerated by the Department of the Interior, or conforming with the new

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[20] The due process clause prevents Congress from "repudiat[ing] its own debts . . . simply in order to save money" and also from modifying an existing contract to which the United States is a party if the legislation deprives the other party of contract benefits "actually reduced to possession." *Public Agencies*, 477 U.S. at 55 (quotations omitted). Neither exception is applicable here.

960-acre limitation of the RRA. In our opinion, section 203(b) is a reasonable way for Congress to further its federal reclamation policy of promoting small farming operations, equitable distribution of water, and water conservation.

The summary judgment in favor of the government and the Natural Resources Defense Council is

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER D. PETERSON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	)	Nos. 87-2681 87-2766 87-2779 87-2780 87-2781 ORDER
DUNNIGAN WATER DISTRICT, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; DONALD P. HODEL, in his capacity as SECRETARY OF THE DEPARTMENT of THE INTERIOR; C. DALE DUVALL, in his capacity as COMMISSIONER OF THE BUREAU OF RECLAMATION OF THE UNITED STATES OF AMERICA, Defendants-Appellees, and NATURAL RESOURCES DEFENSE COUNCIL, INC., Defendant/Intervenor-Appellee.	)	(Filed May 7, 1990)

Before: NORRIS, NOONAN and LEAVY, Circuit Judges

The Motion for Clarification, filed 3/28/90, is hereby **GRANTED**.

The Court has amended the final sentence of its opinion to read:

> "The summary judgment in favor of the government and the Natural Resources Defense Council is AFFIRMED."

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER D. PETERSON, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF INTERIOR, et al., Defendants.	)	87-2766 CV-87-0175-RAR (Filed June 10, 1990)
CENTRAL VALLEY PROJECT WATER ASSOCIATION; SACRAMENTO RIVER WATER CONTRACTORS ASSOCIATION, Plaintiffs-Appellants, vs. DEPARTMENT OF THE INTERIOR; DONALD P. HODEL, Secretary of the United States Department of the Interior; UNITED STATES BUREAU OF RECLAMATION, Defendants-Appellees, and NATURAL RESOURCES DEFENSE COUNCIL, INC., Defendant-Intervenor-Appellee.	)	

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER D. PETERSON, et al.,
Plaintiffs,
vs.
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants.

87-2779

WESTSIDE WATER DISTRICT, a public entity; KANAWHA WATER DISTRICT, a public entity,
Plaintiff-Appellants,
vs.
UNITED STATES OF AMERICA; DONALD P. HODEL, in his capacity as SECRETARY OF THE DEPARTMENT OF THE INTERIOR; C. DALE DUVALL, in his capacity as COMMISSIONER OF THE BUREAU OF RECLAMATION OF THE UNITED STATES OF AMERICA,
Defendants-Appellees,
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Defendant/Intervenor-Appellee.

CV-86-0657-RAR

(Filed June 10, 1990)

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER D. PETERSON, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	)	87-2780
	)	CV-86-0882-RAR
ARVIN-EDISON WATER STORAGE DISTRICT; SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT; PANOCHE WATER DISTRICT; SAN LUIS WATER DISTRICT; LOWER TULE RIVER IRRIGATION DISTRICT; DELANO-EARLIMART IRRIGATION DISTRICT; TULARE IRRIGATION DISTRICT; CATHERINE STEVENS ZAHN; LAVERNE STEVENS SIEBERT, Plaintiffs-Appellants, vs. UNITED STATES OF AMERICA; DONALD P. HODEL, in his capacity as SECRETARY OF THE DEPARTMENT OF THE INTERIOR; C. DALE DUVALL, in his capacity	)	(Filed June 10, 1990)

as COMMISSIONER OF THE BUREAU OF RECLAMATION OF THE UNITED STATES OF AMERICA,

Defendants-Appellees,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Defendant-Intervenor-Appellee.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER D. PETERSON, et al., Plaintiffs-Appellants, vs. UNITED STATES OF AMERICA, et al., Defendants-Appellees, and NATURAL RESOURCES DEFENSE COUNCIL, INC., Defendant-Intervenor-Appellee.	)	87-2781 CV-86-238-RAR (Filed June 10, 1990)

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER D. PETERSON, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	)

DUNNIGAN WATER DISTRICT, Plaintiff-Appellant, vs. UNITED STATES OF AMERICA; DONALD P. HODEL, in his capacity as SECRETARY OF THE DEPARTMENT OF THE INTERIOR; C. DALE DUVALL, in his capacity as COMMISSIONER OF THE BUREAU OF RECLAMATION OF THE UNITED STATES OF AMERICA, Defendants-Appellees, and NATURAL RESOURCES DEFENSE COUNCIL, INC., Defendant-Intervenor-Appellee.	)	87-2681 CV-85-1644-RAR (Filed June 10, 1990)

APPEAL from the United States District Court for the EASTERN District of CALIFORNIA (SACRAMENTO)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the EASTERN District of CALIFORNIA (SACRAMENTO) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ___ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

FILED 03-14-90
Filed and entered AMENDED 05-11-90

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER D. PETERSON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR et al., Defendants.	)	Nos. 87-2681 87-2766 87-2779 87-2780 87-2781 ORDER
DUNNIGAN WATER DISTRICT, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; DONALD P. HODEL, in his capacity as SECRETARY OF THE DEPARTMENT OF THE INTERIOR; C. DALE DUVALL, in his capacity as COMMISSIONER OF THE BUREAU OF RECLAMATION OF THE UNITED STATES OF AMERICA, Defendants-Appellees, and NATURAL RESOURCES DEFENSE COUNCIL, INC., Defendant/Intervenor-Appellee.	)	(Filed May 31, 1990)

Before: NORRIS, NOONAN and LEAVY, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX E

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Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF CALIFORNIA

PETER D. PETERSON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Civil No. S-85-1644-RAR [Consolidated Action No.] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Filed July 14, 1987)

I

The above-captioned cases only having been consolidated for purposes of dispositive motions, came before

the Court on April 13, 1987 for hearing on cross-motions for summary judgment and on defendants' and intervenor's motions to dismiss. Appearances were made for: plaintiffs Westside Water District, Kanawha Water District and Intervenor LaGrande Water District by Andrea M. Miller, Thomas Birmingham and J. Mark Atlas; plaintiffs Arvin-Edison Water Storage District, Southern San Joaquin Municipal Utility District, Panoche Water District, San Luis Water District, Lower Tule River Irrigation District, Tulare Irrigation District, Saucelito Irrigation District, Catherine Stevens Zahn and LaVerne Steven Siebert by Scott Kuney, Diane Rathmann, Kenneth Kuney and Ernest Conant; plaintiffs Glenn-Colusa Irrigation District, Solano Irrigation District, Peter D. Peterson, Patricia Peterson, Jeffrey Shimizu, Paul Minasian as Trustee of the Amy Peterson, John Peterson, James Peterson and Michael Peterson Trusts by Paul Minasian; and plaintiff Dunnigan Water District by Russell Millsap.

David A. Kubichek and Sandra K. Dunn, United States Department of Justice, Land and Natural Resources Division appeared on behalf of the defendants the United States of America, the U.S. Department of the Interior, the U.S. Bureau of Reclamation and various officials thereof. Finally, appearances were made for intervenor Natural Resources Defense Council by Hamilton Candee and Ralph Cavanagh.

The Court, having reviewed all of the pleadings and opposition thereto and having considered the oral arguments of counsel, renders the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT:

1. The plaintiffs are various water districts and/or landowners located within the boundaries of the plaintiff water districts who have entered into water service contracts with the United States, through the U.S. Bureau of Reclamation, for the delivery of water from the federally constructed and operated Central Valley Project and Solano Project.

2. These projects are only a part of the federal reclamation program initiated with the passage of the National Irrigation Act of 1902 (32 Stat. 388), codified at 43 U.S.C. §§ 371, *et seq.*

3. The purpose of the federal reclamation program, as initially conceived, was to reclaim the arid west by encouraging people to leave their homes in the east or mid-west by offering them ownership in small parcels of land, not to exceed one hundred and sixty acres and by making available to them federally developed irrigation water.

4. In exchange for the right to use this federally developed water the water users, individually, became obligated to repay to the reclamation fund a per acre charge to cover the cost of construction and an assessment for the operation and maintenance cost. The cost of the development and operation of these federal reclamation projects is heavily subsidized by the government, however, as the Secretary was not authorized to charge interest on that portion of the construction costs of the project allocated to irrigation.

5. Certain conditions were imposed by Congress in the 1902 Act on the receipt of this subsidized irrigation water. In the first instance, Congress required that there be no sale of water to any landowner who was not an actual bona fide resident of the land upon which the water was to be used or at least residing in the neighborhood of said lands. Moreover, Congress prohibited the use of water for land in private ownership which exceeded one hundred and sixty acres. 43 U.S.C. § 431.

6. These conditions were imposed by Congress to further the original purpose of the federal reclamation program to assist and encourage the small farmer and to ensure that the enormous expenditures by the United States to construct these projects did not go in disproportionate share to a few individuals with large landholdings.

7. In 1926 Congress enacted the Omnibus Adjustment Act of 1926 (44 Stat. 636). A major change made by the 1926 Act was to revise the program by requiring that the Secretary contract with various water districts, organized under the laws of the state wherein they were located, for the delivery of water rather than contracting directly with individual landowners.

8. Pursuant to these contracts, *i.e.*, water service or repayment, the districts became responsible for the allocation, distribution and delivery of project water. Furthermore, the repayment of the construction and operation and maintenance costs of the project became a general obligation of the districts.

9. Such contracts were entered into by the plaintiff water districts. These contracts all provide that a specified amount of water from the federal project is allocated to a particular district annually. In exchange, the district pays a charge to the United States that is supposed to be at least sufficient to cover an appropriate share of the annual operation and maintenance costs and an appropriate share of the cost of construction of the project works connected with the water supply allocated to irrigation. 43 U.S.C. § 485h(e). The water service charge included in each of plaintiffs' contracts is, however, at a fixed rate for a period of forty years with the exception of Kanawha Water District and LaGrande Water District which contracts permit the adjustment of the price every five years to account for changes in operation, maintenance and replacement costs and Panoche Water District and San Luis Water District which contracts permit the adjustment of the water rate for water from the Delta-Mendota Canal after the year 1996.

10. Being fixed, these rates have not kept up with the increasing cost of operation and maintenance of the projects. Consequently, the rates charged the plaintiff districts are no longer sufficient to cover annual operation and maintenance costs, let alone any of the construction costs. In fact, with the operation and maintenance deficit plus the interest subsidy, the recipients of water from these federal reclamation projects pay to the United States an amount far below the actual cost of producing and delivering that water. As noted by Congress in the legislative history of the Reclamation Reform Act, it was calculated that the United States would spend approximately $4 billion on Bureau of Reclamation projects by

1987. Yet because of the existing repayment policies, the United States would only recoup about $275 million in return for its investment.

11. Not only was the reclamation program as a whole failing to repay the construction cost of projects as originally intended, many water users had discovered methods through which they could avoid the one hundred and sixty acre limitation on the receipt of subsidized project water. Through the practice of unlimited leasing a landowner who owns one hundred and sixty acres would lease additional lands, sometimes in the thousands of acres, thereby receiving water at the subsidized rate for his or her entire operation. During the legislative process leading to the enactment of the Reclamation Reform Act, Congress found that approximately 3% of the farming operations receiving reclamation benefits accounted for control of over 30% of the irrigated lands in the program.

12. Although neither reclamation law nor plaintiffs' contracts expressly authorized it, this practice of unlimited leasing was allowed to continue until 1982 when Congress, realizing that the true intent and import of the 1902 Act was not being met, faced the issue head on by enacting the Reclamation Reform Act of 1982.

13. Although Congress had no intention of abandoning the original goals of the program, economic, social and environmental considerations that were highlighted by the move from an agrarian society to a highly industrialized nation made it apparent that certain fundamental changes in the legislation were necessary. With the increase in cost of farming operations, Congress determined that the previous ceiling of one hundred and

sixty acres was no longer appropriate. In addition, in light of the scarcity of water in the west and the inducement to waste it if prices do not keep up with costs, Congress determined that price reforms were needed.

14. Therefore, in the new Act Congress increased the acreage limitation from 160 acres to 960 acres. 43 U.S.C. § 390dd. Concurrently, Congress required that those benefiting from the increased acreage limitations would pay a price for the water at least sufficient to cover the operation and maintenance costs of the project and that those costs were to be calculated annually. 43 U.S.C. § 390hh. For those landholders leasing lands in excess of nine hundred and sixty acres, Congress specifically stated that they were entitled to receive project water but required that they pay full cost for all water provided to those lands. 43 U.S.C. § 390ee(a).

15. The new increased acreage limitations did not apply automatically to all beneficiaries of the program. 43 U.S.C. § 390cc. A district entering into a new or amendatory contract with the Bureau was required to come under all of the provisions of the RRA. Moreover, in the event a district did not enter into such a contract, an individual landholder wishing to benefit from the increased acreage limitations could also elect to be subject to all of the provisions of the new law. 43 U.S.C. § 390cc(c).

16. Districts and landholders desiring to remain under the acreage limits of prior law were permitted to do so but became subject to certain RRA provisions, including Section 203(b), also known as the "hammer clause." 43 U.S.C. § 390cc(b). Section 203(b) specifically

provides that the Secretary shall not deliver water to lands leased in excess of one hundred and sixty acres in any district which has an existing contract and which does not elect to be subject to the RRA unless full cost is paid for such water received on those lands. Congress delayed the effective date of Section 203(b) until April 12, 1987.

17. The Department of the Interior has interpreted the legislation in rules and regulations which were finally published on April 13, 1987. The Act and the regulations include a provision which establishes the method for calculating an individual's landholding for purpose of enforcing the acreage limitations, including Section 203(b). This rule, known as the "westwide rule," requires that all lands owned or operated under a lease in one or more districts throughout the seventeen reclamation states be considered in determining the applicability of acreage limitations, as well as Section 203(b).

18. The impact of Section 203(b) is to increase the price of water to individual landholders who lease lands in excess of 160 acres. The increased price represents the cost of the water that is being distributed, including interest.

19. Plaintiffs challenge implementation of Section 203(b) and the westwide rule on the following grounds:

a. That they abrogate the plaintiffs' rights under their water service contracts in violation of the Due Process Clause and the Just Compensation Clause of the Fifth Amendment of the Constitution;

b. That they constitute an *ex post facto* law in violation of the Constitution, which claim was subsequently dismissed with prejudice by stipulation of the parties;

c. That implementation of these provisions results in a denial of equal protection;

d. That they violate plaintiffs' civil rights under 42 U.S.C. § 1983; and

e. That the United States should be equitably estopped from implementing Section 203(b) or the west-wide rule as against the plaintiffs.

Conclusions of Law

A. General

1. This Court has subject matter jurisdiction to resolve this dispute under 28 U.S.C. § 1331 and 43 U.S.C. § 390uu.

2. Venue is proper pursuant to 28 U.S.C. § 1391 inasmuch as this dispute arose and the plaintiff districts are located within the confines of the Eastern District.

3. The issues raised by plaintiffs in their complaint constitute a case and controversy which are ripe for resolution.

B. Civil Rights Act, 42 U.S.C. § 1983

1. A cause of action exists under 42 U.S.C. § 1983 only if it can be demonstrated that the defendants have

deprived the plaintiffs of some federally protected constitutional right while acting under the color of state law.

2. Defendants herein are federal agencies and/or officers therein who are acting in their official capacity under the federal constitution, federal statute and federal regulation. There has been no activity taken by the defendants under the color of state law.

3. Plaintiffs have failed to state a claim against the defendants pursuant to 42 U.S.C. § 1983.

C. Equal Protection

1. The rational basis test is to be applied by the Court to determine the validity of plaintiffs' allegation that implementation of 203(b) and the westwide rule will result in a violation of plaintiffs' right to equal protection under the law.

2. Under the rational basis test Section 203(b) and the westwide rule will be sustained if the classification established is rationally related to some legitimate Congressional objective. *Schweiker v. Wilson,* 450 U.S. 221, 234-235 (1980).

3. The Supreme Court in *Ivanhoe v. McCracken,* 357 U.S. 275 (1957) held that it was a reasonable classification to limit the amount of project water available to each individual under the federal reclamation program in order that benefits may be distributed in accordance with the principle of the greatest good to the greatest number. "The limitation insures that this enormous expenditure will not go in disportionate share to a few individuals with large landholdings." *Id.* at 297.

4. By 1982 Congress determined that the primary goals of the reclamation program were not being achieved. Instead of small farms being provided with subsidized water, there was a concentration of ownership. In the RRA, Congress met this problem head on by enacting reforms intended to achieve the original goals.

5. The Court therefore finds as a matter of law that the classification established by Congress under the Reclamation Reform Act, and most particularly Section 203(b), is reasonably related to legitimate Congressional objectives be they social, political, economic or ecological.

D. Equitable Estoppel

1. Equitable estoppel is rarely, if ever, applied against the sovereign and then only in the most narrow of circumstances. *Heckler v. Community Health Services*, 467 U.S. 51 (1983).

2. For there to be a viable cause of action under the doctrine of equitable estoppel there must be evidence of some knowing misrepresentation relied upon by plaintiff and in the case of an action against the United States there must also be evidence of some affirmative misconduct on the part of the governmental entity.

3. Reading the plaintiffs' papers in the most liberal terms, assuming all the allegations are true and accurate, plaintiffs have failed to demonstrate any type of misrepresentation, either direct or indirect, inferred or circumstantial.

4. Moreover, the Court finds no showing of any affirmative misconduct. There have been no deliberate

lies, no patterns of making false promises which the government never intended to keep, nor has there been any type of concealment.

5. Plaintiffs have failed to demonstrate the elements necessary for this Court to equitably estop the United States from implementing Section 203(b) or the westwide rule.

E. Due Process

1. The Contract Clause of the Constitution does not apply to the federal government. Any limitations on the actions of the United States affecting contracts may be attacked only if they constitute a denial of due process.

2. The circumstances which justified the Supreme Court's finding in *Perry v. United States*, 294 U.S. 330 (1934) and *Lynch v. United States*, 292 U.S. 571 (1933) that there was a violation of due process, are not present in this case.

3. Congress in adopting Section 203(b) was enacting legislation pursuant to its paramount power under the Property Clause to advance a legitimate social purpose. *Ivanhoe v. McCracken*, 357 U.S. at 275. Congress was not acting simply out of a desire for economic gain to repudiate a federal monetary obligation.

4. The Supreme Court has repeatedly stated that subsequently enacted legislation may limit or interfere with previously acquired rights so long as Congress was acting pursuant to its authority under the Constitution. *F.H.A. v. The Darlington*, 358 U.S. 84 (1958).

5. The Court disagrees with the plaintiffs' allegation that Section 203(b) was enacted primarily to increase federal revenues. The important social, political and ecological goals inherent in the legislation fully justify its enactment and any economic benefits to the United States which might result as a consequence of the legislation are merely incidental. More importantly, the relationship between the plaintiffs and the United States is not one of debtor-creditor.

6. Congress, by enacting this legislation, was acting to foster the important social goals of the original 1902 Act, to distribute the reclamation subsidy widely and in such a fashion as to benefit the small family farmer. In the RRA Congress revised the subsidy program in a manner which it believed would better effectuate the goals of the original Act.

7. Neither Section 203(b) nor the westwide rule violate the Due Process Clause of the Constitution.

F. Just Compensation

1. Implementation of Section 203(b) and the westwide rule does not constitute a taking so as to violate the Fifth Amendment of the Constitution.

2. There has been no permanent physical invasion of property. There is no actual or implied interference with plaintiffs' right to continue to use the property in the same manner as it has been used in the past.

3. There has been no demonstration that Section 203(b) will cause a severe impact on property rights causing a complete loss of value of those rights. Plaintiffs

have failed to address with sufficiency the alternatives available to them to mitigate the economic impact of Section 203(b). By either amending their contracts or making irrevocable elections plaintiffs can continue to receive federal water on landholdings up to 960 acres at a subsidized price sufficient to cover operation and maintenance cost of the federal project. Albeit this price is higher than the plaintiffs' contract rate, it is much lower than the full cost rate under Section 203(b).

4. Implementation of Section 203(b) or the westwide rule will not affect the reasonable investment-backed expectations of the plaintiffs. Although Section 203(b) will make the cost of doing business greater, there is no evidence to support the conclusion that the plaintiffs will go out of business as a result of an increase in the cost of water.

5. Having determined that there has been no taking, it is unnecessary to consider the availability of the Tucker Act, 28 U.S.C. § 1346, as a remedy or the plaintiffs' alternative statutory construction regarding eminent domain.

6. Through the years plaintiffs have been receiving virtually free water. The Court finds nothing unconstitutional in Congress passing legislation, which in hindsight should have been enacted some fifty years earlier, to put the reclamation program back on track of its original goals and purposes.

G. Motion to Strike

1. The Court has reviewed all of the parties' amendments to their statements of undisputed facts and has made its own findings of fact.

2. Plaintiffs' motion to strike intervenor's undisputed facts will therefore be denied.

IT IS THEREFORE ORDERED that plaintiffs' motion to strike is DENIED;

IT IS FURTHER ORDERED that defendants' and intervenor's motions to dismiss plaintiffs' causes of action based on 42 U.S.C. § 1983, the *ex post facto* clause, and equal protection are GRANTED;

IT IS FURTHER ORDERED that defendants' and intervenor's motions for summary judgment on the remaining issues are GRANTED;

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is DENIED.

DATED: 7/18/87

/s/ Raul A. Ramirez
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM.

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

By Andrea M. Miller
ANDREA M. MILLER
Lead Counsel for Plaintiffs

APPENDIX F

AD 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PETER D. PETERSON V. UNITED STATES DEPARTMENT OF THE INTERIOR	JUDGMENT IN A CIVIL CASE (Filed July 15, 1987) CASE NUMBER: CIV S-85-1644 RAR

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT BE AND IS HEREBY ENTERED ACCORDING TO THE DISMISSAL ORDER DATED JULY 14, 1987.

July 15, 1987
Date

J.R. GRINDSTAFF
Clerk

G. Miyasato /s/ George Miyasato
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
for the
Eastern District of California

PETER D. PETERSON	)	
V	)	CASE NO.
	)	CIV S-85-1644 RAR
UNITED STATES	)	
DEPARTMENT	)	NOTICE
OF THE INTERIOR	)	
	)	
	)	

TO:

YOU ARE HEREBY NOTIFIED THAT: Judgment was entered in this action on July 15, 1987.

JAMES R. GRINDSTAFF,
CLERK

Sacramento, California
Dated: July 15, 1987

By: /s/ George Miyasato
Deputy Clerk

APPENDIX G

United States Constitution:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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43 U.S.C. § 390cc(b):

(b) Amendment of existing contracts

Any district which has an existing contract with the Secretary as of October 12, 1982, which does not enter into an amendment of such contract as specified in subsection (a) of this section shall be subject to Federal reclamation law in effect immediately prior to October 12, 1982, as that law is amended or supplemented by sections 209 through 230 of this title [43 U.S.C.A. §§ 390ii to 390zz-1, 373a, 422e, 425b, 485h]. Within a district that does not enter into an amendment of its contract with the Secretary within four and one-half years of October 12, 1982, irrigation water may be delivered to lands leased in excess of a landholding of one hundred and sixty acres

only if full cost, as defined in section 390bb(3)(A) of this title, is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres: *Provided,* That the interest rate used in computing full cost under this subsection shall be the same as provided in section 390ee(a)(3) of this title.

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43 U.S.C. § 390dd:

§ 390dd. Limitation on ownership

Except as provided in section 390ii of this title, irrigation water may not be delivered to—

(1) a qualified recipient for use in the irrigation of lands owned by such qualified recipient in excess of nine hundred and sixty acres of class I lands or the equivalent thereof; or

(2) a limited recipient for the use in the irrigation of lands owned by such limited recipient in excess of six hundred and forty acres of class I lands or the equivalent thereof;

whether situated in one or more districts.

(Pub. L. 97-293, Title II, § 204, Oct. 12, 1982, 96 Stat. 1265.)

Historical Note

Legislative History. For legislative history and purpose of Pub. L. 97-293, see 1982 U.S. Code Cong. and Adm. News, p. 2570.

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43 U.S.C. § 390ee:

§ 390ee. Pricing

(a) Delivery of irrigation water at full cost

Notwithstanding any other provision of law, any contract with a district entered into by the Secretary as specified in section 390cc of this title, shall provide for the delivery of irrigation water at full cost as defined in section 390bb(3) of this title to:

(1) a landholding in excess of nine hundred and sixty acres of class I lands or the equivalent thereof for a qualified recipient,[1]

(2) a landholding in excess of three hundred and twenty acres of class I land or the equivalent thereof for a limited recipient receiving irrigation water on or before October 1, 1981; and

(3) the entire landholding of a limited recipient not receiving irrigation water on or before October 1, 1981: *Provided,* That the interest rate used in computing full cost under this paragraph shall be determined by the Secretary of the Treasury on the basis of the arithmetic average of—

(A) the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations which are neither due nor callable for redemption for fifteen years from the date of issuance; and

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[1] So in original. The comma probably should be a semicolon.

(B) the weighted average of market yields on all interest-bearing, marketable issues sold by the Treasury.

during the fiscal year preceding the fiscal year in which the expenditures are made, or October 12, 1982, for expenditures made before October 12, 1982.

(b) Delivery of irrigation water at prior terms and conditions

Any contract with a district entered into by the Secretary as specified in section 390cc of this title, shall provide for the delivery of irrigation water to lands not in excess of the landholdings described in subsection (a) of this section upon terms and conditions related to pricing established by the Secretary pursuant to Federal reclamation law in effect immediately prior to October 12, 1982, or, in the case of an amended contract, upon the terms and conditions established by such contract prior to the date of its amendment. However, the portion of any price established under this subsection which relates to operation and maintenance charges shall be established pursuant to section 390hh of this title.

(c) Delivery of irrigation water to lands under recordable contracts

Notwithstanding any extension of time of any recordable contract as provided in section 390ii(e) of this title, lands under recordable contract shall be eligible to receive irrigation water at less than full cost for a period not to exceed ten years from the date such recordable contract was executed by the Secretary in the case of

contracts existing prior to October 12, 1982, or five years from the date such recordable contract was executed by the Secretary in the case of contracts entered into subsequent to October 12, 1982, or the time specified in section 390rr of this title for lands described in that section: *Provided*, That in no case shall the right to receive water at less than full cost under this subsection terminate sooner than eighteen months after the date on which the Secretary again commences the processing or the approval of the disposition of such lands.

(Pub.L. 97-293, Title II, § 205, Oct. 12, 1982, 96 Stat. 1265.)

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43 U.S.C. § 390ii(a):

§ 390ii. Disposition of excess lands

(a) Disposal of lands in excess of ownership limitations within reasonable time

Irrigation water made available in the operation of reclamation project facilities may not be delivered for use in the irrigation of lands held in excess of the ownership limitations imposed by Federal reclamation law, including this subchapter, unless and until the owners thereof shall have executed a recordable contract with the Secretary, in accordance with the terms and conditions required by Federal reclamation law, requiring the disposal of their interest in such excess lands within a reasonable time to be established by the Secretary. In the case of recordable contracts entered into prior to October 12, 1982, such reasonable time shall not exceed ten

years after the recordable contract is executed by the Secretary. In the case of recordable contracts entered into after October 12, 1982, except as provided in section 390rr of this title, such reasonable time shall not exceed five years after the recordable contract is executed by the Secretary.

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43 U.S.C. § 485:

§ 485h. New projects; sale of water and electric power; lease of power privileges

(a) Findings of Secretary

No expenditures for the construction of any new project, new division of a project, or new supplemental works on a project shall be made, nor shall estimates be submitted therefor, by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on—

(1) the engineering feasibility of the proposed construction;

(2) the estimated cost of the proposed construction;

(3) the part of the estimated cost which can properly be allocated to irrigation and probably be repaid by the water users;

(4) the part of the estimated cost which can properly be allocated to power and probably be returned to the United States in net power revenues;

(5) the part of the estimated cost which can properly be allocated to municipal water supply or other miscellaneous purposes and probably be returned to the United States.

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply or other miscellaneous purposes found by the Secretary to be proper, together with any allocation to flood control or navigation made under subsection (b) of this section, equal the total estimated cost of construction as determined by the Secretary, then the new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary. If all such allocations do not equal said total estimated cost, then said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefor has been made by Act of Congress enacted after the Secretary has submitted to the President and the Congress the report and findings involved.

(b) Allocation of part of cost to flood control or navigation

In connection with any new project, new division of a project, or supplemental works on a project there may be allocated to flood control or navigation the part of said total estimated cost which the Secretary may find to be proper. Items for any such allocations made in connection with projects which may be undertaken pursuant to subsection (a) of this section shall be included in the estimates of appropriations submitted by the Secretary for

said projects, and funds for such portions of the projects shall not become available except as directly appropriated or allotted to the Department of the Interior. In connection with the making of such an allocation, the Secretary shall consult with the Chief of Engineers and the Secretary of the Army, and may perform any of the necessary investigations or studies under a cooperative agreement with the Secretary of the Army. In the event of such an allocation the Secretary of the Interior shall operate the project for purposes of flood control or navigation, to the extent justified by said allocation therefor.

(c) Furnishing water to municipalities; sale of electric power; lease of power privileges

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided,* That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in

advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further,* That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 [7 U.S.C.A. § 901 et seq.]. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

(d) Delivery of water for irrigation; repayment contract prerequisites

No water may be delivered for irrigation of lands in connection with any new project, new division of a

project, or supplemental works on a project until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States, in a form satisfactory to the Secretary, providing among other things—

(1) That the Secretary may fix a development period for each irrigation block, if any, of not to exceed ten years from and including the first calendar year in which water is delivered for the lands in said block; and that during the development period water shall be delivered to the lands in the irrigation block involved at a charge per annum per acre-foot, or other charge, to be fixed by the Secretary each year and to be paid in advance of delivery of water: *Provided,* That where the lands included in an irrigation block are for the most part lands owned by the United States, the Secretary, prior to execution of a repayment contract, may fix a development period, but in such case execution of such a contract shall be a condition precedent to delivery of water after the close of the development period: *Provided further,* That when the Secretary, by contract or by notice given thereunder, shall have fixed a development period of less than ten years, and at any time thereafter but before commencement of the repayment period conditions arise which in the judgment of the Secretary would have justified the fixing of a longer period, he may amend such contract or notice to extend such development period to a date not to exceed ten years from its commencement, and in a case where no development period was provided, he may amend such contract within the same limits: *Provided further,* That when the Secretary shall have deferred the payment of all or any part of any installments of construction charges under any repayment contract pursuant to the authority of the Act of September 21, 1959

advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: *Provided further,* That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 [7 U.S.C.A. § 901 et seq.]. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

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(1) That the Secretary may fix a development period for each irrigation block, if any, of not to exceed ten years from and including the first calendar year in which water is delivered for the lands in said block; and that during the development period water shall be delivered to the lands in the irrigation block involved at a charge per annum per acre-foot, or other charge, to be fixed by the Secretary each year and to be paid in advance of delivery of water: *Provided*, That where the lands included in an irrigation block are for the most part lands owned by the United States, the Secretary, prior to execution of a repayment contract, may fix a development period, but in such case execution of such a contract shall be a condition precedent to delivery of water after the close of the development period: *Provided further*, That when the Secretary, by contract or by notice given thereunder, shall have fixed a development period of less than ten years, and at any time thereafter but before commencement of the repayment period conditions arise which in the judgment of the Secretary would have justified the fixing of a longer period, he may amend such contract or notice to extend such development period to a date not to exceed ten years from its commencement, and in a case where no development period was provided, he may amend such contract within the same limits: *Provided further*, That when the Secretary shall have deferred the payment of all or any part of any installments of construction charges under any repayment contract pursuant to the authority of the Act of September 21, 1959

(73 Stat. 584), he may, at any time prior to the due date prescribed for the first installment not reduced by such deferment, and by agreement with the contracting organization, terminate the supplemental contract by which such deferment was effected, credit the construction payments made, and exercise the authority granted in this section. After the close of the development period, any such charges collected and which the Secretary determines to be in excess of the cost of the operation and maintenance during the development period shall be credited to the construction cost of the project in the manner determined by the Secretary.

(2) That the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization; and that the organization may vary its distribution of construction charges in a manner that takes into account the productivity of the various classes of lands and the benefits accruing to the lands by reason of the construction: *Provided*, That no distribution of construction charges over the lands included in the organization shall in any manner be deemed to relieve the organization or any party or any land therein of the organization's general obligation to the United States.

(3) That the general repayment obligation of the organization shall be spread in annual installments, of the number and amounts fixed by the Secretary, over a period of not more than 40 years, exclusive of any development period fixed under paragraph (1) of this subsection, for any project contract unit or, if the project contract unit be divided into two or more irrigation blocks, for any such block, or as near to said period of not more than forty years as is consistent with the adoption and operation of a variable payment formula which, being based on

full repayment within such period under average conditions, permits variance in the required annual payments in the light of economic factors pertinent to the ability of the organization to pay.

(4) That the first annual installment for any project contract unit, or for any irrigation block, as the case may be, shall accrue, on the date fixed by the Secretary, in the year after the last year of the development period or, if there be no development period, in the calendar year after the Secretary announces that the construction contemplated in the repayment contract is substantially completed or is advanced to a point where delivery of water can be made to substantially all of the lands in said unit or block to be irrigated; and if there be no development period fixed, that prior to and including the year in which the Secretary makes said announcement water shall be delivered only on the toll charge basis hereinbefore provided for development periods.

(e) Contracts to furnish water

In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share

of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to subsection (d) of this section.

(f) Public participation

No less than sixty days before entering into or amending any repayment contract or any contract for the delivery of irrigation water (except any contract for the delivery of surplus or interim irrigation water whose duration is for one year or less) the Secretary shall—

(1) publish notice of the proposed contract or amendment in newspapers of general circulation in the affected area and shall make reasonable efforts to otherwise notify interested parties which may be affected by such contract or amendment, together with information indicating to whom comments or inquiries concerning the proposed actions can be addressed; and

(2) provide an opportunity for submission of written data, views and arguments, and shall consider all substantive comments so received.

(Aug. 4, 1939, c. 418, § 9, 53 Stat. 1193; Aug. 8, 1958, Pub.L. 85-611, §§ 1, 3, 72 Stat. 542, 543; Aug. 28, 1962,

Pub.L. 87-613, § 2, 76 Stat. 407; Oct. 12, 1982, Pub.L. 97-293, Title II, § 226, 96 Stat. 1273.)

Historical Note

References in Text. The Rural Electrification Act of 1936, referred to in subsec. (c), is Act May 20, 1936, c. 432, 49 Stat. 1363, as

APPENDIX H

Excerpts from House and Senate
Reports on Federal Reclamation Law Reform

HOUSE OF REPRESENTATIVES

97TH CONGRESS) (REPORT
2d Session) (No. 97-458

AMENDING AND SUPPLEMENTING THE FEDERAL RECLAMATION LAWS, AND FOR OTHER PURPOSES

MARCH 15, 1982.—Committed to the
Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. UDALL, from the Committee on
Interior and Insular Affairs,
submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany H.R. 5539]

* * *

BACKGROUND AND NEED

The Federal reclamation program was begun with the enactment of the Reclamation Act of 1902 (32 Stat. 388). The initial purpose of the law, which was an outgrowth of earlier Homestead and Desert Land Entry Acts, was to establish a program of Federal financial assistance for water resource development projects which were necessary if settlers were to establish irrigated farms on the arid public lands of the West. That Act contained acreage limitation provisions designed to: (1) distribute widely

the benefits of publicly financed reclamation projects; (2) promote the family farm as a desirable form of rural life; and (3) preclude the accrual of speculative gains from the Federal investment.

As the program has evolved, it is now a major water resource development program involving principal river basins and multi-purpose projects providing hydroelectric power, municipal and industrial water supply, flood control and public recreation in addition to the original irrigation purpose. Irrigation does continue to be a principal and substantial aspect of the program. The gross value of crops produced from reclamation farms approaches $7 billion annually.

The 1902 Act has been amended or supplemented on numerous occasions. Section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 636) contains the latest acreage limitation provisions, and, as the last legislative enactment in this area, it provides the basis for administration of the acreage limitation provisions of Federal reclamation law. These provisions place a limit of 160 acres on the quantity of irrigable land in a single ownership to which Federal reclamation project water may be supplied. The provisions have been interpreted and enforced to permit water deliveries to 320 acres of irrigable land owned jointly by a husband and wife. Non-excess land is considered to be all irrigable land that can be served in a project service area not in excess of 160 acres (320 acres for a husband and wife) in the ownership of one individual. This limitation of 160 acres per individual owner has remained unchanged since the reclamation program was initiated in 1902. It has been contended that the limitations of existing law are too restrictive, given today's

economy, to support a viable farming operation, which must have power to enter into the contract and to collect by levy and assessment against the lands in the district the amount of the contract obligation.

Before individual landowners actually begin receiving Federal irrigation water for their lands, the irrigation district in which such lands are located must enter into a contract with the Secretary of the Interior agreeing to repay operation and maintenance costs, and the portion of the project investment costs allocated to irrigation over a fixed period (usually 40 years) without interest. In most instances, the repayment is limited to an amount less than the full irrigation allocation which is the computed "repayment capacity" of the farms, and the costs in excess of that capability are returned to the Treasury by electric power or municipal water revenues from the projects. The district must agree to enforce the acreage limitations of the law by delivering water only to eligible lands which are those within the limitations or which have been placed under recordable contract, if in excess of the limitation.

Excess land is defined as all the irrigable land owned by one landowner within the project service area in excess of the acreage that constitutes the landowners non-excess holding. The owner of excess land is required to designate from his holdings the land he wishes to have considered non-excess and thereby receive a project water supply.

Excess lands are eligible to receive a project water supply if the owner places them under a recordable contract agreeing to dispose of the excess lands covered by

the contract within a specified period to eligible non-excess owners at a price that does not reflect the value of the project benefits accruing to that land. If the landowner fails to make the disposition in the period allowed, a power of attorney will vest in the Secretary of the Interior to sell the land.

In addition to the requirement that excess land be sold to an eligible nonexcess owner, the sale price must be approved by the Secretary of the Interior. The price at which excess land can be sold is based on the actual bona fide value of that land at the date of appraisal without reference to the value enhancement to the land attributable to the project.

Non-excess land is not subject to the same restrictions and limitations as is excess land. Non-excess land can be sold by the owner at any price obtainable and will continue to be eligible for a project water supply provided that the lands acquired do not become excess in the hands of the buyer.

LEASING

No provision of reclamation law specifically addresses the issue of leasing of lands receiving Federal reclamation water. Consequently, although the Bureau of Reclamation has exercised some control over leasing arrangements in the past, the Department of the Interior has imposed no general prohibitions against, or limits on, the leasing of project lands. Thus, under current practice an individual can own and receive a project water supply for 160 acres of irrigable land and receive a project water supply for all of the land which he leases so long as the

person or persons owning the land he leases are otherwise.

RESIDENCY

The original 1902 Act required that a landowner be a resident on or in the neighborhood of the land in order to be eligible to receive a project water supply. However, the Omnibus Adjustment Act of 1926 does not contain provisions requiring an individual to reside on or near the land in order to be eligible to receive water. As a consequence, the Department of the Interior has not enforced a residency requirement on landowners since that time.

CORPS OF ENGINEERS PROJECTS

Section 8 of the Flood Control Act of 1944 provides that when the Corps of Engineers builds any dam or reservoir for flood control which may be "utilized" for irrigation purposes, the Secretary of the Interior is authorized to "construct, operate, and maintain, under the provisions of the Federal reclamation laws. . . . such additional works in connection therewith as he may deem necessary for irrigation purposes." The Department of the Interior is of the opinion that this language requires it to impose the acreage limitation and other provisions of reclamation law on landowners who "utilize" water obtained from Corps projects for irrigation purposes by use of either federally authorized and financed diversion facilities or privately financed diversion facilities.

Many irrigators who use water for irrigation from rivers on which Corps projects are located but who have

financed and constructed their own diversion and water delivery systems argue that they were never intended to be subject to the acreage limitation and other provisions of reclamation law and that Section 8 of the Flood Control Act of 1944, in and of itself, does not subject them to the requirements of reclamation law.

PAYOUT

A number of repayment contracts have been entered into over the years providing for termination of acreage limitations after the contractual obligation for the particular project allocated to irrigation have been fully repaid. Twenty-two contracts containing such payout provisions have previously been ratified by the Congress. However, a Federal District Court ruled in 1976 that such payout provisions are invalid, thus placing a cloud over sixty-seven other contracts containing payout provisions which have not been ratified by the Congress.

EQUIVALENCY

The purpose of the equivalency concept is to help assure the viability of farms on reclamation lands where productivity is less and to assure that owners of less productive lands are not at a disadvantage compared to owners of better quality lands. In a nutshell, the equivalency concept is a method to relate the most productive land, designated class 1, to less productive lands classified 2, 3, or 4. A larger acreage entitlement is allowed for the less productive land to enable an equivalent productivity to class 1 land. The concept was developed in the 1950's and has been authorized on a project-by-project basis for 18 reclamation projects.

EXPLANATION OF H.R. 5539

H.R. 5538, as amended,[1] has two titles. Title I establishes new acreage limitation and pricing policies, but only as to new irrigation districts which enter contracts with the Secretary after the date of enactment, irrigation districts which receive additional or supplemental benefits after the date of enactment which were not previously authorized by law, irrigation districts which have preexisting contracts with the Secretary and request that those contracts be amended to conform to the provisions of Title I and, as to individuals who elect to receive the benefits and to be bound by the provisions of Title I, although the district in which their farming operation is situated does not make such an election.

ACREAGE LIMITATION

As to those districts or individuals to which the provisions of Title I are made applicable, the limitation on the number of acres of land owned by any person and which are eligible to receive water developed or furnished by or through federally financed facilities for a Federal reclamation project is increased to 960 acres of class 1 land, or its equivalent.

The eligible lands owned by any person may consist of lands situated in the same district, or several parcels situated in more than one district, but the cumulative

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[1] The Committee on Interior and Insular Affairs approved an amendment in the nature of a substitute bill to H.R. 5539. Any reference to the bill herein is a reference to the amendment in the nature of a substitute.

total of eligible lands owned by any person may not exceed 960 acres of class 1 land, or its equivalent.

For the purposes of the bill, a person is defined as any individual, including his or her spouse and other dependents within the meaning of the Internal Revenue Code, who is a citizen of the United States or a resident alien, or any partnership or association of such individuals organized under State law, or a domestic corporation which is not a member of an affiliated group and which does not have more than eighteen individual shareholders. A corporation which has more than eighteen individual shareholders will be treated as a person under Title I if it was receiving project water on or before October 1, 1981. Also, any religious or religious charitable organization will be treated as an individual under the provisions of the bill, if the organization meets certain specific requirements.

The acreage limitation for lands of lesser productivity may be increased as to lands which are made subject to, or become subject to, the provisions of Title I by the application of an equivalency formula.

Lands which are held in excess of the acreage limitations imposed by the Federal reclamation laws, including those imposed under the provisions of Title I, and which are receiving water upon the date of enactment, may continue to receive water if they have been placed under a recordable contract requiring their disposition, or if the owners have requested that a recordable contract be executed by the Secretary. Project water which is made available from facilities constructed after the date of enactment may be delivered to such excess lands, but not

unless and until the owners have executed a recordable contract providing for their disposal. In each case, if the lands are otherwise subject to Title I, the landowner would be required to dispose of only those lands which are in excess of 960 acres.

PRICING

Under existing law, each irrigation district which receives water from federally constructed reclamation facilities must enter into a contract with the Secretary of the Interior which obligates the district to repay that portion of the construction costs of the project which are properly allocable to irrigation. Repayment is made in installments over a fixed period of time (usually 40 years) without interest. In determining the repayment obligation, the Secretary may take into consideration the ability of the farms in the district to repay the costs allocated to irrigation. Consideration of the "ability to pay" factor may reduce the repayment obligation below the amount which would otherwise be allocated to irrigation. The deficiency is generally recovered from sales of electric power or sales of water to be used for municipal and industrial purposes.

In addition to the obligation to repay construction costs, the district is also required to pay to the United States the operation and maintenance costs of the project works so long as they are in the control of the United States.

Because interest is not charged in computing the repayment obligation of a district and the ability to pay is

made a factor in computing the obligation, it has generally been considered that the water the district receives for irrigation purposes is delivered to it at a "subsidized" rate.

The pricing provisions of Title I and the acreage limitation provisions are related only to the extent that they are applicable solely to districts or to lands held by individuals who become subject to the provisions in the Title.

The repayment obligation assignable to lands owned or held as a tenant by any person who elects to become subject to the provisions of Title I, or who holds lands in a district which becomes subject to the provisions of the Title, will be computed as to the first 960 acres of class 1 land, or its equivalent, at the rate required by the district's contract, or, in the case of new contracts, at a rate to be computed by the Secretary in the same manner as the obligation is computed under existing law. In other words, those persons who become subject to the provisions of Title I will receive water for the first 960 acres of class 1 land, or its equivalent, which they own or farm as a tenant at the so-called subsidized rate. The land to receive water at the subsidized rate may be situated in a single district, or may consist of more than one parcel situated in more than one district. However, the cumulative total of lands owned or held by any person which receive project water and to which the subsidized rate will be applicable may not exceed 960 acres of class 1 land, or its equivalent.

The repayment obligation assigned to any lands in excess of 960 acres of class 1 land, or its equivalent, held

by any person in a district which becomes subject to the provisions of Title I, or held by a person and which become subject to the provisions of the Title, will be computed at a rate which is defined as full cost.

The full cost which is applicable to such lands is exclusive of operation and maintenance costs. It is to be paid only by the person holding the lands to which it is assigned and is not to be averaged into the rate charged or any levy assessed against any other person in the district.

The full cost formula will recover to the United States interest on the remaining repayment obligation assigned to the lands to which it is applicable. The interest is to be computed on the actual construction costs allocated to irrigation as of the time the expenditure by the United States was made without consideration of, and without any reduction attributable to, the ability to pay.

A corporation which was receiving project water on or before October 1, 1981, will be treated as a person under the pricing provisions of Title I. However, a corporation which was not receiving water prior to October 1, 1981, and which has more than eighteen individual stockholders will be required to pay full cost as to all of the lands farmed by it and which receive project water.

In those situations in which a district does not elect to become subject to the provisions of Title I, but individuals within the district do make such an election, the district will be expected to deliver water to the lands held by such individuals and to collect from them the full cost charge for all lands held by any such individual in excess

of 960 acres and to remit such amount to the United States.

The requirements for the disposition of excess lands which are subject to the provisions of Title I differ from the requirements of existing law in two major respects. First, if the lands are not disposed of by the owners and a power of attorney vests in the Secretary for disposition by him, he is required to sell the lands through an impartial selection process. Second, any excess lands which are sold into non-excess status may continue to receive water only if their title is burdened by a covenant prohibiting their sale for a period of ten years at a value exceeding the value of the land unrelated to the delivery of project water plus the value of any newly added improvements.

The price of water delivered to a district must be sufficient to cover all operation and maintenance costs which the district is obligated to pay to the United States. Whenever a district enters into a contract with the Secretary, or requests that its contract be amended to conform to the provisions of Title I, and each year thereafter, the Secretary shall calculate such operation and maintenance charges and shall modify the contract as necessary to reflect any changes in such costs by amending the district's contract accordingly. It is not intended that this provision be employed to require renegotiation of the district's contract each year, or that it be used as a device by the Secretary to require any modifications in the contract which may be unrelated to operation and maintenance charges. The Committee anticipates that the Secretary will, by regulation, establish a simplified procedure for effecting the contract amendments required by the provision.

Districts which have existing contracts with the Secretary and which do not request amendments to their contract in order to avail themselves of the benefits of the provisions of Title I will remain subject to the requirements of the present laws. The Committee recognizes that it is not desirable to have a situation in which there are differing policies and laws applied to the administration of what is essentially the same Federal program. However, the Committee also recognizes that there are in existence valid contracts entered into in full compliance with the law which govern the obligation of the district and its members to the United States. The Committee believes that, where possible, the United States should be held fully bound to its contracts and that it would be inappropriate as a matter of public policy, if not of law, for the Congress to unilaterally change a district's contract to impose upon it an obligation different than that to which it is presently committed.

Title I also requires that each landowner and lessee within a district which becomes subject to the provisions of the title must furnish the district a certificate, in a form prescribed by the Secretary, that they are in compliance with the provisions of the Act. It is expected that the certificates will be available for the inspection of the Secretary, or his subordinate officials. The Secretary also may require any lessee to submit to him, for his examination, a complete executed copy of any lease which covers lands within a district subject to the provisions of Title I. Although not explicitly required, the Committee expects that these provisions will be made applicable to individuals electing to become subject to the provisions of the title in those districts which do not make such an election.

Title II contains provisions of general applicability.

An important provision of Title II is one which makes it clear that residency shall not be made a condition to the receipt of project water under the Federal reclamation laws, including the provisions of Title I.

It has long been argued that the failure of the Omnibus Adjustment Act of 1926, which contained the most recent provisions on acreage limitations, to restate the residency requirements of Section 5 of the Reclamation Act of 1902, manifested an intent to repeal the requirement. The Committee believes that this argument should be resolved and has concluded that a requirement that the receipt of water be conditioned on residency is not practical. It is not uncommon today for a farmer to be actively engaged on a daily basis in a farming operation and yet reside many miles from the farm. Indeed, in many areas, because schools have been concentrated in the urban centers, a farmer with school age children of a necessity must reside some distance from the farm.

Title II also contains certain exemptions from the acreage limitations and other provisions of the Federal reclamation laws, including the limitations contained in Title I. One of these is an exemption for certain projects constructed by the Army Corps of Engineers. The exemption applies unless the project has explicitly been designated, made a part of, or integrated with a Federal reclamation project or the Secretary has provided project works for the control or conveyance of an agricultural water supply for the lands involved. The irrigation benefits, if any, which most of the projects, including the Kings River project in California, receive from the works

constructed by the Corps of Engineers are incidental, at most, to the principal purposes of the project and the Committee intends that these projects are and shall be exempt from the acreage limitation and other requirements of the reclamation laws. However, the Committee recognizes that, in the future, the Secretary of the Interior may, pursuant to authorizing legislation, provide irrigation works in some areas which are an integral part of a project for which the Corps of Engineers has the primary responsibility, or that Congress may by statute designate a part of such a project as a reclamation project. In either of these events, the exemption provided by Title II would not apply.

* * *

ADDITIONAL VIEWS

Overview

* * *

SUBSIDIES IN RECLAMATION

In reviewing the subsidization of water projects in 1981, the United States General Accounting Office concluded that "the original rationale for building federal projects and increasing the subsidy . . . have been reached and projects should be reevaluated in light of current economic and social conditions."[1] So, too, must the Congress reevaluate the agricultural, economic and social purposes of the federal Reclamation program in light of the economic reality of the 1980s.

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[1] GAO, "Federal Charges for Irrigation Projects Reviewed Do Not Cover Costs" (Washington, 3/13/81) inv.

The original purpose of the Reclamation laws was to encourage settlement of the West by providing subsidized benefits to small, family farmers. The subsidies were justified as a lure to promote settlement, and to enhance the profitability of agricultural development which would have been marginal, or altogether impossible in the absence of the subsidy.

Subsidies and small farming have forever been inextricably linked in the Reclamation program. As recently as 1959, during the debate on the massive San Luis Unit in California's Central Valley, the intent of that project was described by its congressional sponsor, Rep. B. F. Sisk: "It is inevitable and historic that under the impact of reclamation laws, as well as the economics of farm management and operation, these lands will break down into family-size units, each cultivated by individual owners and their families." Anticipating that subsidized benefits would flow to small farms, Congress has repeatedly authorized projects and appropriated funds for this program.

Even before enactment of the Reclamation program, participants in the irrigation Congresses of the 1890s warned that the program could become a "scheme of speculators and land grabbers to loot the national treasury for private profit." As we know from the Environmental Impact Statement of 1980 on the proposed Reclamation regulations, that prophecy has come to pervade a substantial portion of today's Reclamation program. According to the EIS, only 2.5% of today's Reclamation farm operations are in excess of the 960-acre limitation established in this legislation. But that small percentage of operators controls over 30% of all the land

in the Reclamation program. Billions of dollars in public subsidies have flowed to wealthy farming interests—the oil companies, railroad, land developers, banks and other corporations—who control massive tracts of agricultural land instead of to small, family farmers.

For years, this Committee and the Congress have heard the opinions of large operators who have enjoyed the benefits of the public investment but objected to government's efforts to assure that those benefits flowed only to those for whom the Reclamation program was intended. This duplicity, however, can be endured no longer. As the eminent conservative columnist George Will has written—

> Compared with some cowboys, symbols of rugged individualism: hairy-chested, leathery-skilled, crows-feet around the eyes—who use heavily subsidized water, graze their cattle on public land for a pittance and have their market protected by beef import quotas—compared with such Marlboro men, the average inner-city welfare mother is the soul of self-reliance.[2]

REDESIGN OF THE RECLAMATION PROGRAM

The goal of these amendments to the Reclamation Act is to redesign the program based on sound economic principles. The water pricing provisions included in H.R. 5539 would introduce fiscal responsibility into the Reclamation program for the first time in its history, and would place water conservation and resource management on a par with irrigation and farm development as goals of the Reclamation Act.

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[2] Washington Post, 10/1/81.

BROAD APPLICATION ESSENTIAL

To achieve these goals, it is vital that the maximum number of irrigators be included under the terms of this Act. To that end, the Committee will require application of the new pricing provisions whenever contracts are signed, amended or extended, and will permit individuals to elect to come under the new law even if the district of which they are members refuses to do so.

Wherever and whenever possible, the Department of the Interior should use the provisions of this Act and the Reclamation laws to recover more fully for the taxpayers of the United States the costs of these projects.

Great potential for cost recovery exists. In California, where many of the larger farms which will be affected by the full cost recovery section are situated, repayment contracts currently exist only for $500 million out of a total of $2.7 billion attributable to irrigation.

PRICING REFORMS

The legislation creates a two-tiered pricing policy, but requires changes in the calculation of water and repayment rates for all farmers regardless of farm size. While subsidies, in the form of the "ability to pay" discount and interest free repayment of construction costs, would continue for farm operations of less than 960 acres, these irrigators will also be affected by the pricing reforms of H.R. 5539.

The bill requires full payment and the annual recalculation of operation and maintenance charges for water service for all irrigators, regardless of farm size.

Although the Bureau of Reclamation currently calculates these costs on an annual basis, O&M charges have frequently been frozen in longterm contracts. Thus in some areas, farmers pay $3.50 an acre foot or less for water which costs the government many times that amount to deliver, despite the irrigator's much greater payment capacity.

Farmers operating more than 960 acres would not only repay full O&M charges, but would lose the "ability to pay" discount, and would be required to pay interest on remaining unpaid construction costs. Large farms would therefore be eligible to participate in the program, but would be denied the substantial financial subsidies intended for smaller farmers.

ABILITY TO PAY REVISIONS

The Secretary should use the opportunity of the new law to correct serious abuses in the calculation of "ability to pay" which result in unjustified subsidies. In its report of May 23, 1975, "More Effective Procedures Are Needed for Establishing Payment Terms and Development Periods for Irrigation Projects," GAO called for the revision of the Bureau's methods for calculating "ability to pay." According to GAO, the Bureau frequently calculates "ability to pay" on the basis of the 320-acre farm allowed by current law, even in the case of farms much larger than 320 acres. Since the larger farm may be more profitable than the smaller farm, the larger farmers would enjoy an unjustified subsidy if his "ability to pay" were calculated on the 320-acre basis. Moreover, GAO noted, current practice allows the Bureau to reduce payment obligations

based on a reduction in an irrigator's payment ability, but does not permit the government to require larger payments when the irrigator's profits improve.[3]

Ability to pay, for farmers with fewer than 960 acres to whom the discount is available in the future, should be calculated on accurate estimates of payment capacity based on a farm's true size and profitability in order to assure a fair return to the government and to minimize unwarranted subsidization. Similarly, a farm with more than 960 acres would not be eligible for an "ability to pay" discount at all for acreage above 960. However, that additional acreage must be considered when determining the true ability to pay of that farmer for his eligible 960 acres.

ELIMINATION OF INTEREST SUBSIDY

Large scale irrigators would lose the "ability to pay" discount entirely, and would be compelled to pay interest on all remaining capital costs. The intent of this requirement is to remove taxpayer subsidies from farms with acreage in excess of 960 acres.

Forgiven interest has long been the most costly subsidy in the Reclamation program. Recent studies by the General Accounting Office have documented the staggering scope of these subsidies, and challenged the rationale for them.

"When these interest subsidies were authorized for irrigation users at the turn of the century, they were

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[3] See GAO Report at page 11; also, "Relationship Between Farm Size and Ability to Pay for Irrigation Water", University of Idaho, cited in GAO at page 5.

considered well affordable because interest rates were very low," GAO noted last year. "With today's high interest rates, more and more tax dollars are needed to provide interest-free financing for irrigators."[4]

In the case of just three projects studied—Oroville-Tonasket, Tualatin, and Lakeview, Texas—the interest subsidy will exceed $660 million. In another major study last year, GAO found that taxpayers will subsidize between 92% and 97% of six projects studied.[5]

GOALS OF PRICING REFORM

There is no intent by the Committee, nor certainly on my part as author of these pricing reforms, to exact usurious repayment from irrigators. Rather, the legislative intent of these reforms is to eliminate unjustified and unintentional subsidies from those who can afford to pay benefits they receive, thereby stimulating improved management and more efficient use of water resources.

Realistic water priving will help to achieve these goals. Over a decade ago, the National Water Commission reviewed pricing policies in California and concluded that "a sharp boost in water use efficiency and declines in consumption occurred after significant increases in price."[6]

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[4] GAO, "Reforming Interest Provisions in Federal Water Laws Could Save Millions (Washington: 10/22/81) 10.

[5] GAO (3/13/81) 37.

[6] "Pricing and Efficiency in Water Resources Management" (1971), cited in the Congressional Record, July 20, 1977, E 4654.

A decade later, the Department of Agriculture issued its report on the Nation's farms, "A Time To Choose," which endorsed "legislation to allow more realistic pricing of water. Like energy, as long as water's price is not reflective of its value in use, conservation will be inadequate."

Potential savings from enhanced prices will be substantial. An Interior Department study in 1979 found that water is used at 40% efficiency when priced between $1 and $3. With a price increase to $10 an acre foot, efficiency was improved by 50%. More realistic pricing of water in comparably arid areas have promoted the extensive use of water conservation technology. In Israel, twice as much crop is produced with the same amount of water we consume in the West. For example, high technology systems like drip irrigation, which uses just 1% as much water as open furrow irrigation still common in the Western United States, is used to grow even row crops like cotton.

Realistic water pricing creates the economic incentive for technological innovation, whereas excessive subsidization encourages reliance on traditional wasteful methods. Much of our Reclamation water is still delivered through unlined ditches, one of the major reasons that only half the water, according to GAO, is ever used on the crops for which is was intended.

Farmers can afford higher prices. In California, adjacent farms often receive water from two separate sources. Those receiving federal, subsidized water pay as little as $3.50 an acre foot while those receiving state project water, which is far less subsidized, are paying $22 to $29.

Because of the fixed price contracts, moreover, the federal customers will still pay $3.50 in 1990 while state project costs will have risen to $61-$70 an acre foot.[7]

PRICES ENCOURAGE EFFICIENCY

Obviously, state project customers survive economically with the higher price. USDA economists Harry Ayer and Paul Hoyt found that higher prices resulted in reduced consumption, substantial water savings, and higher profits for irrigators. Ayer and Hoyt concluded that increasing water prices in Arizona from very low (50¢ per acre inch) to medium high ($2 to $5 per acre inch) would result in a six inch saving per acre, or a project-wide reduction of 3%. That volume of water, equivalent to 144,000 acre feet, could provide water service to the entire city of Tucson for two years.

Moreover, Ayer and Hoyt concluded farmers' profits could rise by 1 percent to 2 percent, even accounting for reduction in crop yields.[8]

STIMULUS TO SMALL FARMS

Lastly, it appears probable that the two-tiered pricing system embodied in H.R. 5539 may provide a greater

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[7] Ronald Robie, Director, California Department of Water Resources, "Comments on the Proposed CVP Water Rate Policy" (2/26/81). For similar findings, see the audit of the Central Valley Project power account, 1977, page 38.

[8] Harry W. Ayer and Paul G. Hoyt, "Irrigation Management and Water Policy: Opportunities to Conserve Water in Arizona", paper presented at Arizona-Nevada Academy of Science, Las Vegas, April 11, 1980.

stimulus to small farms than the legislative promise of the original Reclamation laws. The continuation of the subsidy for smaller farms, according to a recent study by the University of California (Davis), hold more promise than for assuring the continuation of small farms in the Reclamation program than the administrative or statutory mandates.

CONCLUSION

The original intent of the Reclamation Program, according to its chief sponsor, was to create an irrigation system "which would impose no burden on the taxpayers of the country." It is evident that the Reclamation program of 1982 imposes phenominal burdens on the taxpayers. It is therefore essential, as we modify the law to satisfy the concerns of irrigators, that we also include long overdue reforms to mitigate the concerns of the taxpayers who have inadvertantly assumed most of the repayment obligations of this program.

It would be fiscally irresponsible to alter the Reclamation program without requiring those water pricing refroms. Without these reforms, how would we explain to those suffering substantial reductions in essential services, due to budgetary restrictions, that some of the wealthiest and most profitable corporations are to continue to receive subsidies from taxpayers?

How would we explain to farmers in the Mid-West, the South and other non-Reclamation states that we use taxpayers money to underwrite the profligate misuse of resources by competitors in the West?

How could we explain to to an elderly citizen in New England whose energy assistance program is under assault, or to commuter whose gasoline bills are astronomic that deregulation is a good policy when the oil companies sell gasoline and home heating oil, but that elimination of subsidies is not a good policy when we sell the taxpayers' water to the oil companies and other large-scale farming interests in the West?

There is no rationale. Regional equity, fiscal policy, responsible resource management and the goals of the Reclamation program not only require the water pricing provisions included in this bill, but compel the Secretary of the Interior to utilize every method at his disposal to insure that these pricing guidelines are imposed as rigorously and as broadly as possible.

GEORGE MILLER.

HOUSE OF REPRESENTATIVES

97TH CONGRESS) (REPORT
2d Session) (No. 97-855

BUFFALO BILL DAM, RECLAMATION REFORM, AND PAPAGO INDIAN WATER RIGHTS

SEPTEMBER 22, 1982.—Ordered to be printed

Mr. UDALL, from the committee of conference, submitted the following

CONFERENCE REPORT

* * *

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the amendment of the House to the bill (S. 1409) to authorize the Secretary of the Interior to construct, operate, and maintain modifications of the existing Buffalo Bill Dam and Reservoir, Shoshone project, Pick-Sloan Missouri Basin program, Wyoming, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed by the managers and recommended in the accompanying conference report:

The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate amendment to the House amendment struck out all of the House amendment and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the Senate amendment and the House amendment. The differences between the Senate amendment, the House amendment, and the substitute agree to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreement reached by the conferees, and minor drafting and clarifying changes.

TITLE I

Except for conforming amendments, the text of Title I, to authorize the Secretary of the Interior to construct, operate, and maintain modifications of the existing Buffalo Bill Dam and Reservoir, Shoshone Project, Pick-Sloan Missouri River Basin program, Wyoming, as passed by the House on August 17, 1982, is identical to the text of S. 1409 as passed by the Senate on June 22, 1982 (S. Rept. 97-420).

TITLE II

Title II, as approved by the House, incorporates the language of HR 5539, a bill to amend and supplement Federal reclamation law, which passed the House on May 6, 1982. The Senate amendment to Title II substitutes in its entirety the language of the amendment to HR 5539 which was approved by the Senate on July 16, 1982.

Existing law places a limit of 160 acres on the quantity of irrigable land in a single ownership to which Federal reclamation water may be supplied. (The law has been interpreted to permit the delivery of water to 320 acres for lands owned by a husband and wife.)

Irrigators who receive water from Federal reclamation projects are allocable to irrigation over a period of years without interest. In computing the repayment obligation of the irrigators, the Secretary also takes into consideration their ability to pay and may reduce the obligation accordingly. Not charging interest on the repayment obligation and the consideration of ability to

pay in computing that obligation have come to be regarded as a subsidy to the irrigators.

Both the House and Senate versions of Title II provide for an increase in the basic ownership limitations and reduce the subsidy for larger farming operations.

The Senate amendment changed the acreage limitation provision of the basic law for all districts. The amendment approved by the House made the new limitation applicable only to new irrigation districts entering into contracts with the Secretary after the date of enactment, those which receive supplemental benefits after the date of enactment which were not previously authorized by law; to districts having existing contracts which agreed to amend those contracts to conform with certain provisions of the new law; and to individuals who desire to take advantage of the new law even though the contracting entity does not do so. Both versions provided for the application of an equivalency formula which permits an increase in the basic acreage limitation for those lands of less productive capability. However, as to districts having an existing contract, the application of equivalency was also made contingent upon the agreement of the district to an amendment to its contract in the amendment approved by the House.

The conferees agreed that the benefits of the new law, which include an ownership limitation of 960 acres and the application of equivalency, should be available to irrigators in districts having existing contracts only if the district agrees to amend its contract to provide for the reduction of the subsidy for larger farming operations in excess of 960 acres and to comply with certain other

provisions of the new law. Individuals in the district may make such an election if the district does not do so. The 960 acre ownership limitation would apply to all districts entering into new contracts, and to those which amend their contracts to receive new or supplemental benefits not existing on the date of enactment, as would all of the requirements which the new law would impose upon the district.

The bill approved by the conference committee also reduces the subsidy for leased lands in those districts not amending their contracts. The conferees agreed that the larger farming operations in such districts which lease lands over and above the basic ownership limitation of 160 acres should not, in the future, receive the subsidy benefit for the additional leased lands. The provision is made effective four-and-one-half years from the date of enactment in order to give districts desiring to amend their contracts sufficient time to comply with the requirements of State law for effecting such amendments and to the Federal requirement that the contracts and amendments be confirmed by a court of competent jurisdiction.)

The conferees intend to make it clear that the provision of Sections 209 through Section 230 of the conference report are intended to be of general application and are, therefore, effective immediately upon enactment and are to be applied to any district or individual, whether or not the district amends its contract pursuant to the new law.

The major differences between the House amendment, the Senate amendment, and the resolution of those differences in the substitute agreed to in the conference are described below:

OWNERSHIP AND SUBSIDY LIMITATIONS

House: The House amendment establishes an ownership limitation of 960 acres for individuals and corporations benefiting 18 or fewer individual shareholders. These operators are subject to a 960-acre limitation on the amount of land owned or leased which can receive water at subsidized rates. Under the House amendment, the ownership limitation for corporations benefiting more than 18 shareholders is 960 acres. Those corporations benefiting more than 18 shareholders, which were receiving water on or before October 1, 1981, will pay full cost for water delivered to lands in excess of 160 acres. Corporations benefiting more than 18 shareholders not receiving water on or before that date will pay full cost for water delivered to all lands.

Senate: The Senate amendment establishes an ownership limitation, as well as a limitation on the amount of land which can receive subsidized water, of 1,280 acres for individuals and legal entities benefiting 25 or fewer individuals. The ownership limitation as well as the limitation on subsidized water for legal entities benefiting more than 25 individuals is 640 acres.

The conferees agreed upon an ownership and subsidy limitation of 960 acres for individuals and legal entities benefiting 25 or fewer individuals and an ownership limitation of 640 acres and a subsidy limitation of 320 acres for legal entities benefiting more than 25 individuals. However, the subsidy for the first 320 acres receiving water would be available only to those larger legal entities which were receiving, or had received, project water on or before October 1, 1981. Such larger legal

entities which had not received water from a Federal reclamation project on or before that date would pay full cost for irrigation water delivered to all lands.

INTEREST RATE

House: The House amendment establishes an interest rate formula to be applied in computing full cost. That formula is the weighted average rate of all Treasury obligations issued during the fiscal year in which expenditures were made for each project. The rate will vary from project to project, but in no event will the rate be less than 5 percent.

Senate: The Senate amendment establishes an interest rate formula to be applied in computing full cost which is the arithmetic average of: (1) the average interest rate on all outstanding Treasury obligations of at least fifteen years' duration; and (2) the weighted average of all new Treasury obligations issued in the year preceding the year in which expenditures were made or the date of enactment, whichever is later. This formula currently results in an interest rate of approximately 11⅝ percent.

The conferees adopted a full cost formula which blends the formula in the House bill and the Senate amendment. The House formula would be applied to expenditures made prior to the date of enactment with a provision that the interest rate be not less than 7½% in any event. For expenditures made subsequent to the date of enactment, the formula contained in the Senate amendment would be applied. Legal entities having 25 or fewer individuals. However, larger legal entities which had not been receiving water from a project on or before October 1, 1981, would be charged full cost at the rate provided in the Senate amendment for all lands irrigated. Full cost will be calculated on a district by district basis.

CERTIFICATION

House: The House amendment provides that districts entering into new contracts or amending their contracts shall require each landowner and lessee within the district to furnish to the district a certificate that they are in compliance with the provisions of the Act. The Secretary may require submission to him of an executed copy of any lease for his examination.

Senate: The Senate amendment has no directly comparable provision. The Senate amendment does impose certain requirements on leasing.

The conferees agreed upon a provision which requires certification of compliance, including the number of acres leased, the term of the lease and that the rent reflects the reasonable value of the irrigation water. The conferees also agreed to a provision which requires that leases be written and for a term of not more than 25 years in the case of perennial crops and 10 years as to all others.

EQUIVALENCY

House: The House amendment provides for the application of an equivalency formula to lands of lesser productive potential within a district which enters into a new or amended contract.

Senate: The Senate amendment provides for a similar equivalency formula which would apply to all districts upon their request.

The conferees agreed that equivalency should be applied only as to those districts which agree to an

amendment to their contracts as required to gain the benefit of the increased acreage limitations. The conferees noted that the Bureau of Reclamation has adopted a system of classification of lands within projects, but intends that the Bureau have flexibility to implement any new system of classification which it might develop. Furthermore, the conferees are aware of the fact that there exists statutory authorization for the application of an equivalency formula to a number of existing Federal reclamation projects. Enactment of this legislation is not intended to alter in any way either the application of equivalency to those projects, or the manner in which it has been applied.

PAYOUT

House: The House amendment provides that the acreage ownership limitation shall not apply to lands in a district after the repayment obligation of the district has been discharged by payment of periodic installments pursuant to the terms of the repayment contract. In addition, the acreage ownership limitation would not only apply to lands in a district after the repayment obligation of the district has been discharged through accelerated payments where so provided in a repayment contract existing on the date of enactment of this Act. Repayment by individuals would also be allowed where provided in a repayment contract existing on the date of enactment.

Senate: The Senate amendment is essentially identical to the House amendment except in two respects. First, the Senate amendment allows accelerated repayment after 95 percent of the repayment obligation has been paid and

a pattern of family farming has been established, regardless of whether the repayment contract provides for accelerated repayment. Second, the Senate amendment provides that a district or individual receiving a Rehabilitation and Betterment loan may avoid application of the acreage ownership limitation by agreeing to repay the loan pursuant to the Small Reclamation Projects Act. The Small Reclamation Projects Act provides for an interest rate of approximately 9⅝ percent.

The provision approved by the conferees is essentially that contained in the House amendment. The conferees recognize that Rehabilitation and Betterment loans are considered as operation and maintenance costs. By adopting the House provision, the conferees do not intend to imply that either existing or future Rehabilitation and Betterment loans subject districts to the extension of the application of the acreage limitations after repayment of construction charges. The conferees also wish to make it clear that a district will not be relieved of liability for the payment of applicable operation and maintenance charges after its repayment obligation has been discharged.

WAIVER OF SOVEREIGN IMMUNITY

House: The House amendment gives the consent of the United States to be sued to determine the rights of any entity which is a party to a reclamation contract with the United States. The provision is a waiver of the sovereign immunity of the United States.

Senate: The Senate amendment provides an identical waiver of sovereign immunity. In addition, the Senate

provision states that a court, if it determines it appropriate based on the evidence, including written representations concerning the application of the federal reclamation law, may reform the contract.

The conferees agreed to the House language. In taking this action, the conferees wish to make it clear that the actions of the conference committee should not be taken as prejudicial to any particular form of evidence or remedy under existing law, but rather the applicable rules of evidence and the applicable remedies should be employed by any court entertaining a suit brought to determine the rights of any party to a reclamation contract with the United States.

OPERATION AND MAINTENANCE CHARGES

House: The House amendment requires that all new and amended contracts provide that the price of project water shall be at least sufficient to recover all O & M charges which the district is obligated to pay to the United States. Each year the Secretary shall calculate such O & M charges and modify the price of project water accordingly. This provision does not apply to districts which operate and maintain project facilities without the benefit of Federal funds.

Senate: The Senate amendment has no comparable provision.

The conferees adopted a provision which would be applicable to all new contracts, contracts amended to receive additional or supplemental benefits after the date of enactment, and to districts electing to amend their contracts to take advantage of the benefits of the new law and to individuals electing to be subject to the new law.

APPLICATION OF FULL COST TO EXCESS LANDS

House: Under the House amendment, the subsidized rate is applicable to the first 960 acres of each farm operation whether or not the land is under recordable contract.

Senate: The Senate amendment allows the delivery of water at subsidized rates to excess lands under recordable contract.

The conferees agreed upon a provision which would permit delivery of water at subsidized rates for a period of ten years from the date the contract was executed as to recordable contracts entered into prior to the date of enactment and for a period of five years from the date of the execution as to recordable contracts executed subsequent to the date of enactment. Any extension of time for the disposal of lands under recordable contract is not to be considered as also extending the period of time in which subsidized water may be delivered to the lands under recordable contract since that water shall be delivered at the subsidized rate, for a period not less than 18 months from the date of enactment, or the date when the Secretary again commences approval of sales under recordable contract in those cases in which he has withheld approval. A special provision was adopted for lands to be placed under recordable contracts in the Central Arizona Project, as noted below.

APPLICABILITY/EXEMPTIONS

House: The House amendment provides for several exemptions from the ownership limitations, but would

retain the limitations on subsidy if they were otherwise applicable.

Senate: The Senate amendment provides for similar exemptions from both the ownership and subsidy limitations. The Senate amendment also provides an exemption from ownership and subsidy limitations for lands which will receive a substitute water supply from a reclamation project and which will be required, by contract, to decrease groundwater pumping in an amount equal to the amount of water received from the federal project.

The conferees agreed upon a provision which blends the intent of the House and Senate amendments.

The conferees also agreed upon a provision which would apply the ownership and pricing provisions applicable to recordable contracts executed for lands in the Central Arizona Project. The provisions limit the delivery of water to such lands at the subsidized rate for a period of ten years from the date the Secretary finds that the lands are capable of being served with irrigation waters.

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LEGISLATIVE HISTORY
P.L. 97-293

BUFFALO BILL DAM: RECLAMATION REFORM ACT OF 1982; AND PAPAGO INDIAN WATER RIGHTS

P.L. 97-293, see page 96 Stat. 1261

Senate Report (Energy and Natural Resources Committee) No. 97-420, May 26, 1982 [To accompany S. 1409]

Senate Report (Energy and Natural Resources Committee) No. 97-373, Apr. 29, 1982 [To accompany S. 1867]

House Report (Interior and Insular Affairs Committee) No. 97-458, Mar. 15, 1982 [To accompany H.R. 5539]

Senate Conference Report No. 97-568, Sept. 22, 1982 [To accompany S. 1409]

House Conference Report No. 97-855, Sept. 22, 1982 [To accompany S. 1409]

Cong. Record Vol. 128 (1982)

DATES OF CONSIDERATION AND PASSAGE

Senate June 22, July 16, September 24, 1982

House May 6, August 17, September 29, 1982

The Senate Reports and the House Conference Report are set out.

SENATE REPORT NO. 97-420
[page 1]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1409) to authorize the Secretary of the Interior to construct, operate, and maintain modifications of the existing Buffalo Bill Dam and Reservoir, Shoshone project, Pick-Sloan Missouri Basin program, Wyoming, and for other purposes, having considered the same, reports favorably thereon with amendments to the text and recommends that the bill as amended do pass.

* * *

SENATE REPORT NO. 97-373
[page 1]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1867) to amend and supplement the acreage limitation and residency provisions of the Federal reclamation law, as amended and supplemented, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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[page 6]

PURPOSE

As reported, S. 1867 is the culmination of extensive effort on the part of both Houses of Congress and reflects previous Committee as well as floor activities seeking to reconcile 80 years of history and law to the current practical considerations of farm practices and economics. As amended, S. 1867 provides a modern statement of Congressional policy on the programs and related administrative efforts carried out pursuant to the Federal reclamation law. In addition, the measure responds directly to many of the concerns previously expressed by reclamation project farmers for updating certain provisions of the reclamation law.

SUMMARY OF MAJOR PROVISIONS

As amended, S. 1867 addresses several major issues related to the reclamation program and in some instances

would mandate significant departures from past or present practice. Major issues and related provisions of the bill are briefly described as follows:

FULL COST

Section 2 defines the full cost which will be paid by recipients of irrigation water when lands are leased in excess of the overall ownership/leasing limitation set forth in the bill. Full cost includes interest at the rate of the average outstanding United States Treasury obligations which are neither due nor callable for 15 years.

ELIGIBILITY

Section 2 establishes that a recipient of water for irrigable land (or "qualified recipient") would be an individual along with his spouse and dependents or a legal entity benefiting 25 individuals or less. A "limited recipient" would be any legal entity benefiting more than 25 individuals.

ACREAGE LIMITATION

Section 4 raises the basic ownership acreage limitation from 160 acres to 1,280 for a qualified recipient and to 640 acres for a limited recipient. An overall combined ownership and leasing acreage limitation of 2,080 acres is established for all recipients. Lands leased below the overall limitation are eligible to receive irrigation water without paying full cost. If lands are leased in excess of the overall limitation, full cost is applied to all lands leased in excess of the ownership limitations (e.g.,

1,280 acres for a qualified recipient; 640 acres for a limited recipient).

EQUIVALENCY

Section 5 requires the application of the acreage equivalency concept to lands of lesser productive potential than Class I lands upon the request of a contracting entity.

RESIDENCY

Section 6 clarifies that residency is not a requirement of Federal reclamation law.

RECORDABLE CONTRACTS

Section 7 provides requirements for recordable contracts for the disposal of lands in excess of the acreage limitations and directs the sale of excess lands by impartial means for which a power of attorney has been vested in the Secretary at the time of expiration of the recordable contract.

PAYOUT

Section 9 provides that the acreage limitations imposed by Federal reclamation law will cease to apply upon repayment of construction costs owed to the Federal Government by the water users of a reclamation project. Lump-sum or accelerated payments are permitted only pursuant to existing contract provisions or after

95 percent of construction costs have been paid and a pattern of family farms has been established.

SPECIAL EXEMPTIONS

Sections 8 and 11 provide that the limitations of Federal reclamation law are not applicable to Corps of Engineers projects, except under circumstances set forth in the statute, nor to certain other special circumstances.

BACKGROUND AND NEED

The basic Federal reclamation law was enacted in 1902 (32 Stat. 388). It has been frequently amended and updated since, and the body of statutory law presently referred to as "the Federal reclamation law" fills three thick volumes encompassing all or parts of hundreds of individual public laws.

The initial purpose of the Reclamation Act, which was an outgrowth of the earlier Homestead and Desert Land Entry Acts, was to establish a program of Federal financial assistance for water resource development projects which were necessary if settlers were to establish irrigated farms on the arid public lands west of the hundredth meridian. The reclamation program was carried out initially by the Reclamation Service, which is now the Bureau of Reclamation in the Department of the Interior.

The program has evolved through the decades and is now a major water resource program involving major river basin development projects providing hydroelectric power, municipal and industrial water supply, fish and

wildlife conservation, flood control, and public recreation in addition to the original irrigation purpose.

Nevertheless, irrigated agriculture continues to be a principal and substantial aspect of the reclamation program. In 1979, the reclamation program supplied a full water supply to nearly 5 million acres and a partial or "supplementary" water supply to over 6 million acres. This acreage is distributed over 214 operating reclamation projects and about 153,000 individual farms. It represents about 3 percent of the Nation's farmland and 25 percent of its irrigated farmland. The gross value of crops from reclamation farms in 1980 was about $7.4 billion.

The 1902 Act has been amended on numerous occasions. Section 46 of the Omnibus Adjustment Act of 1926 (44 Stat. 636) contains the latest acreage limitation provisions, and, as the last legislative enactment in this area, it provides the basis for administration of the acreage limitation provisions of Federal reclamation law. These provisions place a limit of 160 acres on the quantity of irrigable land in a single ownership to which Federal reclamation project water may be supplied. These provisions have been interpreted and enforced to permit water deliveries to 320 acres of irrigable land owned jointly by a husband and wife. Non-excess land is considered to be all irrigable land that can be served in a project service area not in excess of 160 acres (320 acres for a husband and wife) in the ownership of one individual. However, it should be noted that the Congress has legislatively exempted certain reclamation projects from this limit.

Under modern reclamation law the irrigation water users sign contracts with the Secretary of the Interior agreeing to repay the portion of the project investment costs allocated to the irrigation function over a fixed period (usually 40 years) without interest. In most instances, moreover, the repayment is limited to an amount less than the full irrigation allocation which is the computed "repayment capacity" of the farmers, and the costs in excess of that capability are returned to the Treasury by electric power or municipal water revenues from Bureau projects.

Excess land is defined as all the irrigable land owned by one landowner within the project service area in excess of the acreage that constitutes the landowners non-excess holding. The owner of excess land is required to designate from his holdings the land he wishes to have considered non-excess and thereby receive a project water supply. Excess lands are not eligible to receive a project water supply unless the owner takes certain actions regarding them.

Excess lands are eligible to receive a project water supply if the owner places them under a recordable contract agreeing to dispose of the excess lands covered by the contract within a specified period to eligible non-excess owners at a price that does not reflect the value of the project benefits accruing to that land.

Non-excess land is not subject to the same restrictions and limitations as is excess land. Non-excess land can be sold by the owner at any price obtainable and will

continue to be eligible for a project water supply provided that the lands acquired do not become excess in the hands of the buyer.

As noted above, the acreage limitation has remained unchanged from the original Reclamation Act of 1902—160 acres per individual owner or 320 acres per husband and wife. Many advocates believe that this limit is not viable in today's economy and that it must be increased to provide a decent standard of living for reclamation land farmers.

Reclamation law does not specifically address the issue of leasing of lands receiving reclamation water. There are at the present time no general prohibitions against, or limits on, the leasing of project lands. An individual can own 160 acres of land and receive a project water supply. He can also receive a project water supply for all of the land which he leases if that land is otherwise eligible to receive project water.

The original 1902 Act required that a landowner be a resident on or in the neighborhood of the land in order to be eligible to receive a project water supply. The Omnibus Adjustment Act of 1926 does not contain provisions requiring an individual to reside on or near the land in order to be eligible to receive water. The Department of the Interior has not enforced a residency requirement on landowners since passage of the 1926 Act. This departmental position was challenged in Federal court when a Federal district court held that residency was a requirement of Federal reclamation law. On appeal, however, the suit was dismissed for lack of standing. (*Yellen v. Andrus* 352 F.Supp. 1300; 595 F.2d 525 (9th Cir.1979).)

[page 10]

Based on the holding in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), the Department of the Interior believes that section 8 of the Flood Control Act of 1944, which provides that on any dam or reservoir project built by the U.S. Army Corps of Engineers which may be "utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain under the provisions of Federal reclamation laws . . . , such additional works in connection therewith as he may deem necessary for irrigation purposes.", requires the Department to impose acreage limitations on landholdings which utilize water obtained from Corps projects through diversion facilities whether funded by the Federal government or privately financed. Irrigators who have financed and constructed their own diversion and delivery systems disagree with the Department's interpretation. They claim that section 8 was not intended to and does not by itself, subject them to either the acreage limitations or other provisions of Federal reclamation law.

A large number of repayment contracts have been entered into over the years which provide for the termination of acreage limitations after the contractual obligations have been fully repaid by the contracting entity, or in some cases, by an individual. Twenty-two contracts containing such payout provisions have been ratified by Congress. However, the *Tulare* decision ruled that such payout provisions are invalid. Therefore, the status of those 67 other contracts containing payout provisions which have not been ratified by the Congress is unclear.

Equivalency is a concept developed in the 1950's to assist farms on reclamation land which is qualitatively less productive than lands held by other owners. Equivalency relates the most productive land, designated Class I, to less productive lands classified II, III, or IV. A larger acreage entitlement is allowed for lower classes of land to enable an equivalent productivity to Class I land, thereby alleviating any competitive disadvantage. The concept has been authorized by Congress on a project-by-project basis, but is not currently applicable to all projects, particularly those authorized before 1950.

As noted above, reclamation water users repay a portion of the project investment costs over a fixed period of time without interest. Considerations in the application of a higher repayment formula include the benefit accruing to the landowner from increased ownership and leasing options, ability to pay, effect on future projects, effect on the viability of existing farms, fair return to the Government, and national versus local benefits, among other factors.

In general, the Bureau of Reclamation and the Secretary have interpreted Reclamation law on a case-by-case basis and through a series of legal opinions and Secretarial instructions. On August 9, 1976, pursuant to a case brought by the National Land for People, a nonprofit organization, the U.S. District Court ruled that the Bureau had not complied with the Administrative Procedures Act and enjoined the approval of sales of excess lands in the Westlands Irrigation District pending promulgation of rules and regulations.

On August 25, 1977, the Bureau of Reclamation published proposed regulations covering the administration of the reclamation law. The regulations were believed by many Western irrigation interests to be severe interpretations of the law, and in several respects were in contradiction to current administrative practice.

Opponents of the regulations successfuliy had the procedure enjoined pending preparation of an environmental impact statement and a draft EIS was circulated by the Carter Administration. Secretary Watt suspended the comment period pending review by the Reagan Administration. On July 21, 1981, the comment period was resumed and extended through December 31, 1981.

A major purpose of S. 1867 is to provide a modern policy expression regarding Federal reclamation law in order to resolve the many controversies which would otherwise result from the implementation of regulations based upon current law.

Legislative History

During the 95th Congress, several measures to amend reclamation law were introduced. Hearings were held by the Committee on Energy and Natural Resources on April 12 and 13, 1978. Consideration of the legislation was not completed prior to adjournment.

In the 96th Congress, measures were introduced in both the House and Senate and hearings were held. On September 14, 1979, following 2 days of floor debate the

Senate bill was forwarded to the House by a vote of 47 to 23. Once again, Congress adjourned prior to final consideration.

In the 97th Congress, S. 1867 was introduced on November 18, 1981. Hearings were held before the full Committee in Washington, D.C. on December 10, 1981, and in Boise, Idaho, on January 11, 1982.

A similar measure, H.R. 5539, was reported by the House Committee on Interior and Insular Affairs on March 15, 1982, and is presently pending further action.

Committee Recommendation and Tabulation of Votes

The Senate Committee on Energy and Natural Resources, in open business session on April 21, 1982, by majority vote of a quorum present, recommended that the Senate pass S. 1867, if amended as described herein:

The roll call vote on reporting the measure was 18 yeas, 1 nay, as follows:

YEAS	NAYS
McClure	Metzenbaum
Hatfield	
Domenici	
Wallop	
Warner	
Humphrey	
Murkowski	
Nickles	
East	
Heinz	
Jackson	
Johnston	
Bumpers	
Ford	

YEAS	NAYS
Matsunaga	
Melcher	
Tsongas	
Bradley	

APPENDIX I

Excerpts from Congressional Record on Federal Reclamation Law Reform

97th Cong., 2d Sess., 128 Cong. Rec. (1982)

8805 CONGRESSIONAL RECORD—HOUSE May 5, 1982

* * *

FEDERAL RECLAMATION LAWS AMENDMENTS

* * *

8826

Mr. KAZEN, Mr. Chairman, if the gentleman from California has no more requests for time, I yield such time as he may consume to the distinguished chairman of the full Committee on Interior and Insular Affairs, the gentleman from Arizona (Mr. UDALL) who, as I have previously said, without his leadership it would have been very difficult for us to have reached the compromises and the agreements that are embodied in this bill.

(Mr. UDALL asked and was given permission to revise and extend his remarks.)

Mr. UDALL. Mr. Chairman, I have been an observer of the House for a long time now. One of the satisfying things about serving on the Committee on Interior and Insular Affairs has been the bipartisan approach we have to most problems, less of the combative arguments that are heard in some of the other committees.

It is true, as so many have said here this afternoon, that we had statesmanship and fairness on both sides of the aisle which enabled us to put together this compromise bill.

The gentleman from Texas (Mr. KAZEN) does not have many reclamation projects in his area or many Indians, for that matter. And yet he has been the leader this year in three major pieces of legislation coming out of the subcommittee.

GEORGE MILLER of California made this whole thing possible by knocking some heads together and talking sense to all of us.

The gentleman from California, Mr. COELHO, and Mr. PASHAYAN, our friend DON CLAUSEN, who brings a great deal of expertise and fairness to this job, and Mr. LUJAN, have also performed exceptional service in helping us put this together.

It took us about 100 years to start on the east coast and to develop America and to settle it. As the development pattern went west, we ran out of land where the Almighty delivered the water you needed for farms. Somewhere in the tier of States, the Dakotas and Nebraska, and Kansas, the patterns shift and there is not enough reliable water from rainfall.

We soon learned if we were going to settle the West and have farming and have a productive country, we were going to have to bring water to the land.

So it was that the 1902 act was enacted as a follow-on to the Homestead Act which has given away millions and millions of acres of publicly owned land to people who would get on the land and work the land and build their homes. And it was a good program. And the reclamation program which extended this idea to the arid States was a good program.

We started out in 1902, as someone said today, with the idea that the 160 acres was a pretty good farm, and it was. A family could live on that.

But times have changed and the country has to change with them. And so we tried these last 5 or 6 years to modernize this act. In fact, I have talked to half-a-dozen Interior Secretaries in my years here. All of them wanted to do it. It seemed insoluble. There were just too many contentious people involved, and interests, and we could not bring it together.

This year in 1982 I thing we are going to finally modernize this law and end the confusion and conflict we have had about it.

16290 CONGRESSIONAL RECORD—SENATE July 14, 1982

* * *

FEDERAL RECLAMATION LAW

16292-16293

Mr. WALLOP, Madam President, today the Senate begins consideration of S. 1867, the Reclamation Reform Act of 1982. As amended and reported by the Committee on Energy and Natural Resources on April 29, 1982, this bill represents the product of the extensive efforts of this and previous Congresses to reconcile current farm practices with 80 years of law and history which began with the passage of the 1902 Reclamation Act.

This bill is necessary not only because the acreage limitations in the 1902 act are, and have been, seriously

outdated for some time, but also because previous administrations over the 80-year history of the program have employed conflicting interpretations of the law. Even worse, they have been lax in enforcing the relevant statutes. In general, the Bureau of Reclamation and Secretaries of the Interior have interpreted reclamation law on a case-by-case basis.

In 1977, the Carter administration proposed regulations under the reclamation law, which many believed were contrary to its intent and to irrigation interests generally. For example, the regulations proposed a residency requirement for reclamation, farmers which had not been imposed since passage of the 1926 Omnibus Adjustments Act. Further, for the first time the regulations placed a limit on leasing. Such a limit had never been a requirement of the law. As a result of court action and a review of the issues initiated by the Reagan administration, the comment period on the new regulations was suspended. However, it is only due to active consideration by Congress of the legislation before us today to reform the Reclamation Act that these or similar regulations are not in effect today. It is therefore imperative that we proceed expeditiously with consideration of S. 1867, so that the Senate may move quickly to a conference with the other body, which has already passed a similar bill.

I would like to emphasize at this point that resolution of the cloud of uncertainty which hangs over the status of reclamation law is not only vital to the 17 Western reclamation States, it is also of primary importance to the Nation as a whole. In 1980, the gross value of crops from reclamation farms was about $7.4 billion. About 153,000

individual farms under the program represent approximately 25 percent of this Nation's total irrigated farmland and produced a variety of crops ranging from grains and forage crops to the fruits and vegetables found on the table of every American. Make no mistake, the decisions made and votes cast on this bill will affect consumers in every State in the Union—North, South, East or West.

16294

FEDERAL "SUBSIDY"

Critics will undoubtedly charge that the "ability to pay" formula in existing law and to some extent in S. 1867 represents an unfair giveaway by the Federal Government. As proof of this assertion, several reports may be cited, including a March 13, 1981, report by GAO entitled "Federal Charges for Irrigation Projects Reviewed Do Not Cover Costs." What is omitted in these criticisms is, first, the history of the existing repayment formula, and second, the contravening conclusions of the reports themselves. The original 1902 Reclamation Act provided for repayment within 10 years. As the 1981 GAO report indicated, "The farmers in early reclamation projects had a difficult time meeting the annual repayment requirements * * * ." Subsequent enactments by Congress attempted to deal with this problem by extending the repayment period, until in 1939 the Reclamation Projects act set forth the concept of "ability to pay" as a consideration in repayment of project costs. That concept was a sound one, based as it was on the notion that many of the benefits of the programs were national in scope

and that those costs which farmers could not bear would be repaid out of power revenues. Ths idea was that it made no sense to drive one of the principal beneficiaries of the programs out of business: that is, the farmer. But on the other hand, it was also imperative to require the farmer to pay the maximum possible while sustaining the national benefits. After a great deal of sophisticated economic analysis, the 1981 GAO report comes to this same basic conclusion:

If WPRS water were priced high enough to recover the construction costs plus a 7.5 percent interest charge, the potential customers of irrigation water could not generate enough extra agricultural yield to pay for the additional expenses required by irrigated agriculture, the projects studied fail the pragmatic test of economic viability for the irrigation facilities. (GAO) report, March 13, 1981, p. 40.)

I hope that those of my colleagues who desired a greater return to the Federal Treasury were listening closely to my last quotation. To paraphrade: An interest rate above 7.5 percent on "full cost" associated with this program will not be paid because it fails the test of "pragmatic * * * economic viability." You can vote for a higher interest rate than that in the committee bill if you like, but it will not result in increased revenues to the Treasury. It will only result in the irrigation farmer deciding not to receive project water, which in the end will adversely affect the Nation's economy. The reclamation law as currently written and as extended with the carefully throughout limitations in S. 1867, preserves the sound policy that beneficiaries of Federal programs should be required to pay for costs to the maximum

extent possible, but not at the expense of the objectives of the program itself.

Madam President, I yield to the Senator from Idaho, Mr. McCLURE.

Mr. McCLURE. I thank the Senator for yielding.

Madam President, as the Senate begins debate on S. 1867, the bill to revise and modernize the Reclamation Act of 1902, there are a few points I would like to make myself, in addition to those Senator WALLOP has mentioned, because as far as I am concerned, nothing this body has undertaken so far this year is of greater importance or significance to my own State and region in particular—but even more importantly to the Nation as a whole.

I joined the Idaho Reclamation Association in 1953—nearly 30 years ago—and one of the items on the association agenda that year was a resolution identifying the need for and advocating a revision of the 1902 Reclamation Act. I mention that fact, Mr. President, not out of nostalgia but only to illustrate that it has taken the Congress of the United States a long time to get to this point. Yet there has been general agreement for some time that the law needs to be amended. The original law is simply not adequate for or consistent with the needs and realities of modern day farming operations. It should not be necessary to point out that farming has changed so dramatically since the law was enacted in 1902 that applying the terms and contexts from that era to the present is somewhat of an exercise in sentimentality. Through a process of evolution, the old law, based as it is on an ownership

limitation of 160 acres has become in many respects unworkable, unrealistic and arbitrary.

* * *

16295

Among the bill's prominent features, as my colleague from Wyoming has mentioned, it raises the acreage limitation from 160 acres per individual to 1,280 acres for a family, with the ability to lease an additional 800 acres. My original bill included a somewhat higher figure, but I am certain there are those who will attack even the 2,080 figure as being excessive. It should be remembered, though, that this acreage limit is for a family and its dependents, regardless of their number, and in today's changing economy 2,080 could soon become as uneconomic as 160 acres has become. I am most anxious that as we update the terms of the 1902 act, that we do so in a manner that will not be obsolete and outdated before the ink is dry.

Accordingly, I feel strongly that we need at least the acreage figure which appears in the bill as reported. I want to reiterate and remind my colleagues that 1,280 acres is the same ownership figure which was included in the bill which the Senate passed earlier. All we have attempted to do is to maintain the incentive for a farmer to be a little bit more successful, a little bit more productive, a little bit better than his neighbor if his personal ability and initiative is such that he can do it. So S. 1867 as reported provides for the ability to operate and irrigate up to an additional 800 acres of land on a lease basis.

Opponents of leasing contend that it provides a mechanism whereby the strawmen of huge corporate conglomerates can benefit from the reclamation program by avoiding the law. To the contrary, I have found in my own State that leasing is needed by the smaller farmer or the young man just starting out for whom capital costs in today's economy make ownership a virtual impossibility. Accordingly, I feel that it is important to provide some mechanism under which farmers can operate under lease, and I believe this bill strikes a reasonable balance on that subject.

* * *

16296

Mr. LUGAR addressed the Chair.

The PRESIDING OFFICER. The Senator from Indiana.

UP AMENDMENT NO. 1087
(Subsequently numbered amendment No. 1935.)

(Purpose: To require repayment of construction costs and interest for irrigation facilities)

Mr. LUGAR. Madam President, I send to the desk an amendment and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Indiana (Mr. LUGAR), for himself and Mr. PROXMIRE, proposes an unprinted amendment numbered 1087.

Mr. LUGAR. Madam President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 17, strike out lines 5 through 20.

* * *

16297

Mr. LUGAR. Madam President, I rise today to propose an amendment to strengthen the cost recovery provisions of the committee's bill.

* * *

16297

The 1902 act never did succeed in recovering repayment of construction costs without interest within 10 years. As early as 1910, Congress authorized support for the reclamation fund from the general fund of the Treasury. The 1914 law extended the repayment period to 20 years. The Omnibus Adjustment Act of 1926 extended it to 40 years and the Reclamation Project Act of 1939 authorized an additional 10-year development period before a farmer has to start repaying construction costs.

The 1939 act also established the important ability-to-pay limitation. The ability to pay principle limits the farmers repayment obligation (even without interest) to 75 percent of the value of the increase in crop value due to the irrigation project minus costs and a reasonable

allowance for profit. Power users and municipal and industrial water users make up the difference. But they also do not pay interest when they pay part of the irrigation costs.

The 1902 act is now altered almost beyond recognition in many water districts. Administrative interpretation has allowed unlimited leasing of land. Administrative practice has approved various multiple ownership arrangements. Subsidized water is therefore delivered to many farms larger than 320 acres. There are about 1 million acres of excess lands. Almost 80 percent of the excess acres of land are in California. The average size of a federally irrigated farm in California's Westlands Water District is approximately 2,200 acres. Although 97 percent of all farms in the reclamation program are 960 acres or below, 31 percent of irrigated acreage is in excess of 960 acres.

We canot return to the days of the 1902 act. But we must act to reduce the subsidy for all new and amended contracts. The Department of the Interior's environmental impact statement on the acreage limitation found that the average water district studied paid 16 percent of the cost of service. We must begin to recover a greater percentage of full cost and to place an equitable limit on the subsidy.

* * *

16298

Our amendment will make no changes in existing contracts. These contracts between a water district and the Secretary provide for a fixed construction repayment

rate or water price to amortize construction costs. They cannot be altered without posing serious legal challenges. Nor would it be fair for the Federal Government to unilaterally alter the prices charged under these contracts. Our amendment therefore applies only to new and renewed contracts or to contracts which are renegotiated in order to secure an additional benefit.

* * *

CONGRESSIONAL RECORD—SENATE

16413 July 15, 1982

* * *

FEDERAL RECLAMATION LAW

* * *

16418

Mr. Goldwater

* * *

Next, I have said the amendment would apply new rules to many existing contracts, even though it purports to apply only to future ones. This result will occur because the amendment applies also to leased lands and to any contract which is amended.

As a practical matter, many old contracts will have to be amended. Every farmer who wants to come under the higher acreage figures of the new law will have to amend his contract as a matter of routine. Thus, the impact of the amendment is far greater than conceded by the sponsors.

* * *

16426

[Letter to:]
Hon. Gaylord Nelson.
Chairman, Committee on Small Business,
U.S. Senate

* * *

In response to a request addressed to Secretary of the Interior for comments the issues you raised Mr. Gilbert G. Stam, Commissioner of Reclamation, made the following statements regarding changes in the water rates.

"We are of the opinion that the charge for water when established and included in a valid binding contract between the United States and a water district is not subject unilateral change either by the Secretary the Interior or by congressional action. The fifth amendment to the Constitution of the United States provides that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation. Contract rights against the United States are protected by this clause.

"As to the question of whether there are any means by which the Government through congressional action, could recover some cost of the subsidy to landowners resulting from foregone interest, we do not believe that the law can be changed or amended retroactively so as to change the repayment provisions of existing contracts, but it could be revised so as to apply to future contracts."

Under 43 U.S.C. § 489h, without the necessity of congressional approval or assent, the Secretary has the authority to enter into long-term or short-term contracts

to furnish water for irrigation purposes at rates, which in his judgment, will produce revenues at least sufficient to cover an appropriate share of annual operation and maintenance and fixed charges, as he deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation. He is authorized to perform all necessary acts pertaining thereto.

Once the Secretary has properly entered into water service contracts (as with Westlands) which do not provide for a unilateral change in rates, they may not be increased either retroactively or prospectively without the agreement of both parties to the contract, i.e., Westlands and the Secretary. To this extent, the landowners in Westlands may be regarded as having a "vested" interest in the rates specified in the water service contracts, since neither past not future rates may be changed without the consent of Westlands. Of course, all landowners in the Westlands Water District are subject to otherwise proper agreements (including amendment of the water rates) approved by vote of a majority of the voting interests.

In view of the foregoing, it is our opinion that water rates charged in applicable contracts may not be changed unilaterally. Therefore, the United States could not unilaterally amend the contract to increase the water rates in order to recover all or any part of the interest subsidy which was the subject of our April 9, 1976, report. B-169128, to you, nor are we aware of any other unilateral method by which the United States might recover such subsidy from landowners in Westlands.

* * *

16511

Mr. WALLOP. Mr. President, there are some obvious problems with this amendment, and they are the same problems that were inherent with the other amendment, frankly. The Senator from Wisconsin talks of a landholding of 960 acres and the farmer receiving water based on his ability to pay. You still have the bureaucracy. You still have an individual judgment being placed on each farmer and the class distinction between those who farm well and those who farm badly. And those who farm well will pay more for their water than those who farm badly. That is a hell of a way to run a nation's agriculture industry, if you want my honest opinion.

Goodness sakes, what are we trying to do here, create a nation with a class of agricultural dolts who get subsidized while the good and the productive simply slide out the door or go elsewhere in the country to compete with the farmers from Wisconsin or Nebraska, or some other place? What kind of a policy is it that selects out those who are incompetent and subsidizes them? That is exactly where we would be with this amendment, and the same arguments that applied on the interest rate in the Lugar-Proxmire amendment before now apply to the Proxmire amendment. You are changing in the middle of the stream an agreement that this country has made. You are asking somebody to recapitalize a farming operation on the basis of a catastrophe that is none of his doing in the world of interest rates, we are talking about trying to get long-term stability in agricultural business. We are trying to get all these people to recognize—by "these people" I am talking about those who come from States that do not have reclamation projects—what it is. In the

first place, I remake my argument that the subsidy goes the other direction. If you want to know the truth of it, State farm water projects deliver water for about half what Federal water projects do. No other segment of this economy is required to pay back public works projects. This has been a longstanding achievement of those involved in these projects that they seek to pay back. They do not pay back any of the small watershed payments except on a 3-percent and 50-percent overall recapture.

The game and fish benefits are not repaid, the municipal water benefits are not repaid, the recreation benefits are not repaid. The Senator from Wisconsin and those who support that position not only seek to subsidize a class of inferior farmers but they seek to make them pay at the cost of subsidizing the rest of America's benefits out of reclamation projects.

I ask the Senate where its sense of equity on that may be. I ask the Senate again to say where the sense of equity may be in a recapitalized new loan on an agreement that was made a long time ago, principally on projects which were built prior to the time of deficit spending.

Those should not be asked to bear the cost of the last 25 or 30 years of profligacy on the part of Congress and other Government officials.

If you are going to treat that farmer the same as a farmer in the West, you will leave this bill pretty much the way the committee has brought it out.

If you live where a reclamation project exists you have no choice in how to get your water, even though

you may have owned it long before the project was built. You have no choice because the delivery facilities come from the Federal Government. They took this out when they built the project. It is not as though you can go back to being a farmer with the water you once possessed.

This Federal Government of ours is heavyhanded all the time, but there is no reason to give it overshoes to walk through all the mud and trample the farmers of reclamation projects down in the mud.

I hope the Senate will see the same folly in this amendment as it saw in the Lugar-Proxmire amendment. It does not change the concept or the principle to change the name of the prime sponsor.

* * *

CONGRESSIONAL RECORD—HOUSE

21399 August 17, 1982

* * *

AUTHORIZING ENLARGMENT OF
BUFFALO BILL DAM AND RESERVOIR
IN WYOMING

* * *

Subtitle A
NEW AND AMENDED CONTRACTS

21400

Sec. 203. (a) The provisions of this subtitle shall be applicable to any district which:

(1) enters into a contract with the Secretary subsequent to the effective date of this Act;

(2) has an existing contract with the Secretary which is amended to enable the district to receive supplemental or additional benefits not previously authorized by law.

(b) Any district or individual which has an existing contract with the Secretary as of the effective date of this title may, within two years of such date, make a written request to the Secretary for his approval that such contract be amended only to conform with the provisions of the subtitle; *Provided*, That the Secretary shall extend the period in which to file the request if the request cannot be made due to circumstances beyond the control of the district. If the Secretary determines that the proposed amendments would conform with the provisions of this subtitle, he shall consider the contract so amended for purposes of this title. Such an amendment shall be binding upon the district or individual and the Secretary for the duration of such contract.

* * *

CONGRESSIONAL RECORD—HOUSE

26073 September 29, 1982

* * *

CONFERENCE REPORT ON S. 1409, BUFFALO BILL DAM, RECLAMATION REFORM, AND PAPAGO INDIAN WATER RIGHTS

Mr. UDALL, Mr. Speaker, I call up the conference report on the Senate bill (S. 1409), to authorize the Secretary of the Interior to construct, operate, and maintain modifications of that existing Buffalo Bill Dam and Reservoir, Shoshone project, Pick-Sloan Missouri Basin program, Wyoming, and for other purposes.

The Clerk read the title of the Senate bill.

The SPEAKER pro tempore. Pursuant to the rule, the conference report is considered as having been read.

(For conference report and statement, see proceedings of the House of September 22, 1982.)

The SPEAKER pro tempore. The gentleman from Arizona (Mr. UDALL) will be recognized for 30 minutes, and the gentleman from California (Mr. CLAUSEN) will be recognized for 30 minutes.

The Chair recognizes the gentleman from Arizona (Mr. UDALL).

Mr. UDALL. Mr. Speaker, I yield myself such time as I may consume.

(Mr. UDALL asked and was given permission to revise and extend his remarks.)

* * *

Of the three titles, title II, the Reclamation Reform Act, is perhaps the most complex. For more than 6 years. I have been personally involved with legislative efforts to revise and reform the Reclamation Act of 1902. The original 1902 legislation was intended to provide a stable, regulated source of water to lands in the arid and semiarid West in order to promote the orderly development of these frontier lands. That legislation permitted a farmer to receive water for 160 acres of owned land.

For many years, that 160-acre limit was adequate to provide an income for a family unit. But now that limit is outmoded, and for a long time Congress has recognized the need to reform the original act.

Everyone agreed that reform was necessary, but there was considerable disagreement over how to reform the reclamation law. Throughout countless hearings, committee meetings, and informal caucuses held this session, a consensus has slowly emerged.

The conference report before the House today contains a compromise that is, I believe, a sound, responsible approach to reform of the reclamation program. The legislation maintains the strong Federal support for the family farm that is the hallmark of the reclamation program. The report recognizes that farm methodology has changed over the last 80 years, and provides a new acreage limitation that more adequately defines a modern, efficient farm operation.

At the same time, the conference report introduces the concept of full-cost pricing. Full-cost pricing provides that those farm operations over the basic acreage limitation will have to pay more for water to those excess lands. They will have to pay a rate that recoups the interest on construction that was foregone in the past.

The main provisions of the conference report are as follows:

First, 960 ownership and subsidy limit for the family unit.

Lands owned in excess of 960 have to be put under recordable contract and sold.

Lands leased and farmed above 960 have to pay full cost: the interest rate for projects already built will be according to the House formula, which is a weighted average of the interest rates in effect when the project

was built. There is a floor on this interest rate of 7 1/2 percent. Projects that incur future construction costs will pay an interest rate of about 11 5/8 percent, according to the formula contained in the Senate bill.

Corporations over 25 persons that are now receiving water can own 640 acres and receive subsidy for 320 acres. Those not yet receiving water can own 640 but pay full cost, with Senate interest rate on all water received.

Second, in order to take advantage of new acreage limits, and other benefits like equivalency and exemption on payout, a district must come in to amend his contract and accept the full cost pricing repayment obligations. A district has 4.5 years to amend; at the end of that time, no water will be delivered above 160 acres unless full cost, at the Senate rate, is charged. This provision eliminates the current practice of unlimited leasing at subsidized rates.

Third, O&M charges will be calculated every year and the rate paid for water delivery must at least cover those charges. This eliminates the current practice of reevaluating O&M every 5 years, which left a 4-year-old rate in effect in many cases.

Fourth, districts that come in to amend must develop a water conservation program and submit it to the Secretary.

Fifth, farmers that own land in excess of 960 acres will be required to enter into recordable contracts to sell that land at the end of a specified time period.

In several respects the conference report is much tougher than the bill approved by the House. The interest rates for full cost pricing are higher. The House bill

originally had a 5-percent floor; now we have a 7-1/2 percent floor. And project construction costs expended in the future will be subject to the Senate interest rate, which is 11-5/8 percent today.

In addition, there is now a "hammer" provision that is intended to end the practice of unlimited leasing at subsidized rates. That provision tells the water districts that they have 4 1/2 years to come in to amend their water contracts. If they fail to come in, at the end of that time period they will have to pay full cost, at the Senate interest rate, for all lands over 160 acres.

And finally, the ownership limits for large corporations is lowered from 960 to 940 acres.

* * *

26075

Mr. CLAUSEN. Mr. Speaker, I yield myself such time as I may consume.

* * *

Mr. Speaker, my principal concern and objective in reclamation reform has been to preserve the family farm unit. Obviously, the ownership acreage limitation set in 1902 is inadequate for the economic, farm circumstances of 1982 and beyond. The hope of the conferees is that the upward revision of the ownership limitation, as well as the change in concept for ownership eligibility to the family farm unit, will enhance the economic viability and productivity of the modern family farm. Upward revision of both the ownership and pricing or subsidy limitations was clearly required to increase farming efficiency and to justify the substantial capital investment for equipment

required for anyone who wants to remain competitive as a farmer or to become a farmer for the first time. To the extent it was available, evidence suggested that 960 acres was sufficiently large to include the vast majority of family farm operations. Under this reform the family farm unit will still be eligible to receive subsidized water for up to 960 acres. However, those larger farming operations which do not qualify as family farms will qualify for subsidized water on substantially fewer acres and will pay full cost above that. Moreover, even those qualified family farms will be required to pay full cost for water above 960 acres. These pricing limitations may very well result in a net gain to the Treasury.

The prevalent and longstanding practice of leasing, so important to farmers just getting started, was not expressly addressed in existing reclamation law. This reform act effectively ratifies that practice while at the same time placing limitations on, among other things, its cost and extent. This act has the important beneficial effect of settling this past uncertainty in the law.

Other important concerns have also been resolved by this act. Any requirement of residency on the lands irrigated is repealed in recognition of today's practicalities. The record is set straight, once and for all, that Corps of Engineer projects not specifically designated otherwise by Congress are not covered by the acreage limitations or other provisions of Federal reclamation law. In my view, this provision rectifies a situation never intended by the Congress to begin with.

25108 CONGRESSIONAL RECORD—SENATE September 24, 1982

* * *

BUFFALO BILL DAM, RECLAMATION REFORM, AND PAPAGO INDIAN WATER RIGHTS—CONFERENCE REPORT

* * *

25110

Mr. Jackson

* * *

I also want to take this opportunity to provide a brief explanation of section 203(d) of the conference report, which states:

Amendments to contracts which are not ordered by the provisions of this title shall not be made without the consent of the non-Federal party.

This provision applies when a district becomes subject to the new law by amending its contract, as described in section 203(a). The purpose of the provision is to protect a district from any effort by the Secretary to require amendments that are not necessary to bring the contract into conformity with the new law. Such amendments may be made only with the consent of the district.

In conclusion, I believe that the conference report on S. 1409 is sound legislation, and I urge my colleagues to join me in supporting it.

* * *

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

BUREAU OF RECLAMATION,
Washington, D.C., September 24, 1982.
HON. JAMES A. MCCLURE,
Chairman, Senate Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your inquiry concerning the additional revenue to the Federal Treasury that would be expected upon implementation of Title II of § 1409.

You will recall that the Congressional Budget Office had produced an estimate of $10-$13 million in additional revenue under the original House version of the bill. This was based on the assumption that under the House bill 25 percent of the districts would elect to be covered by the new law.

The Conference Report, however, will produce additional revenues over the original projections for the House bill, because there are increased incentives for districts to amend their contracts and come under the new pricing provisions. In additon, all districts will be subject to new pricing after 4½ years from enactment. Therefore, we have recalculated the revenue projections based on a very conservative set of assumptions.

Our projections produce an estimated minimum annual increase of $17 million to the Treasury for the initial years after enactment. After 4½ years from enactment, additional revenues will jump to a minimum of $34 million, if everyone elects to come under the 960-acre limitation. (For the initial period after enactment, we are assuming that 50 percent of the districts will amend and 30 percent of the farms exceed 960 acres.)

On the other hand, if 75 percent of the districts decide to amend after 4½ years, then the remaining quarter will pay 12 percent interest on landholdings over 160 acres and will thereby generate an overall revenue increase due to Title II of § 1409 of $70 million.

Again, we should emphasize that these are minimum projects and a number of factors could generate increased revenues.

We hope this information is useful. If we can provide any further assistance, please do not hesitate to call.

Sincerely,

ROBERT N. BROADBENT,
Commissioner of Reclamation

APPENDIX J

EXHIBIT E

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

CONTRACT BETWEEN THE UNITED STATES AND THE LOWER TULE RIVER IRRIGATION DISTRICT PROVIDING FOR WATER SERVICE

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3* Amendment, October 15, 1959
4* Amendment, April 18, 1962

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Central Valley Project, California

CONTRACT BETWEEN THE UNITED STATES AND THE LOWER TULE RIVER IRRIGATION DISTRICT PROVIDING FOR WATER SERVICE

Action No. 57512
Ex. No. 10
FILED
7/5/62

Sacramento
Office Draft
2-14-50
Revised 8-10-50
Approved W. O.
11-24-50
175-2771

THIS CONTRACT, made this 1st day of May, 1951, in pursuance generally of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts mandatory thereof or supplementary thereto, all collectively herein styled the Federal reclamation laws, between THE UNITED STATES OF AMERICA, herein styled the United States, represented by the Secretary of the Interior, and the LOWER TULE RIVER IRRIGATION DISTRICT, a political subdivision of the State of California, duly organized, existing and acting pursuant to the laws thereof, with its principal place of business in the County of Tulare, State of California, herein styled the District,

WITNESSETH, THAT:

EXPLANATORY RECITALS

WHEREAS, the United States is constructing the Central Valley Project for diversion, storage, carriage, distribution and beneficial use, for flood control, irrigation,

municipal, domestic, industrial, generation and distribution of electric energy, salinity control, navigation and other purposes, of waters of the Sacramento River and San Joaquin River and their tributaries; and

WHEREAS, the United States proposes to construct and operate the Friant-Kern Canal, which will be used, in part, for the furnishing of water to the District pursuant to the terms of this contract; and

WHEREAS, the District desires to contract, pursuant to the Federal reclamation laws and the laws of the State of California, for the furnishing by the United States of a supplemental water supply from the Project for which the District will make payment to the United States upon the basis, at the rates, and pursuant to the conditions hereinafter set forth; and

WHEREAS, investigations of the District lands and present water supply indicate that irrigated and irrigable lands within the boundaries of the District are at present in need of additional water for irrigation and certain areas have a potential need of water for irrigation, and that ground water underlying the District is seriously depleted and in need of replenishment and that an additional water supply to meet these present and potential needs can be made available by and through the works constructed and to be constructed by the United States; and

WHEREAS, investigations of the stream flow in the Sacramento River and the San Joaquin River and their tributaries indicate that there will be available for furnishing to the District from the Friant-Kern Canal an additional water supply for surface diversion and direct

application for irrigation, and directly or indirectly to replenish depleted ground waters underlying the District;

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein contained, it is hereby mutually agreed by the parties hereto as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term

(a) "Secretary" or "contracting officer" shall mean the Secretary of the United States Department of the Interior or his duly authorized representative;

(b) "Project" shall mean the Central Valley Project, California, of the Bureau of Reclamation;

(c) "Initial delivery date" shall mean the date, announced by the Secretary, on which water first will be available for furnishing to the District by means of the Friant-Kern Canal pursuant to this contract;

(d) "year" shall mean the period from and including March 1 of each calendar year through the last day of February of the following calendar year;

(e) "calendar year" shall mean the period from January 1 through December 31, both dates inclusive;

(f) "Class 1 water" shall mean that supply of water at Friant Dam and Reservoir which, subject to the contingencies described in Article 8 hereof, will be available for delivery from the Friant-Kern and Madera Canals and the

San Joaquin River as a dependable water supply during each irrigation season;

(g) "Class 2 water" shall mean that supply of water which becomes available in addition to the supply of Class 1 water and which, because of its uncertainty as to availability and time of occurrence, will be undependable in character and will be furnished only if, as, and when said water is available as determined by the United States.

TERM OF CONTRACT

2. That contract shall be effective from the date first hereinabove written and shall remain in effect for a period of forty (40) years. Commencing with the year in which the initial delivery date occurs.

WATER TO BE FURNISHED TO DISTRICT

3. (a) Each year until the sixth year after the year in which the initial delivery date occurs or until the year following that in which Success Dam on the Tule River has been constructed and placed in operation, whichever is the longer period, the United States will furnish to the District and the District each such year will accept and pay, as provided in Article 5 hereof, for Class 1 and Class 2 water from the Friant-Kern Canal in the quantities specified in a schedule submitted by the District in accordance with Article 4 (a), but in any event not more than forty thousand (40,000) acre-feet of Class 1 water and two hundred seventy-four thousand (274,000) acre-feet of Class 2 water, for each such year: *Provided*, That no

Class 1 water shall be furnished to the District and the District shall not be obligated to accept and pay for Class 1 water until the date, announced by the contracting officer, that the facilities necessary for furnishing Class 1 water have been completed, and after said date no more than eighty-seven (87) per cent of the total quantity of water called for by the District during any such year in the aforesaid schedule shall be Class 2 water, nor shall the United States be obligated to furnish more than forty thousand (40,000) acre-feet of Class 1 water during any such year.

(b) In the sixth year after the year in which the initial delivery date occurs or the first year after that in which Success Dam on the Tule River has been constructed and placed in operation, whichever is the later, and each year thereafter during the remainder of the term of this contract, the United States shall furnish to the District and the District shall accept and pay for, as provided in Article 5 hereof:

(i) forty thousand (40,000) acre-fee of Class 1 water; and

(ii) one hundred thousand (100,000) acre-feet of Class 2 water: *Provided*, That the District may, at any time or times within fifteen (15) years after the initial delivery date by written notice furnished to the United States on or before November 1, increase such maximum amount of Class 2 water to be furnished to it in the succeeding year and each year thereafter during the remainder of the term of this contract, but in no event shall the total amount of such Class 2 water to be furnished by the United States and accepted and paid for by the District in any year be

in excess of two hundred and seventy-four thousand (274,000) acre-feet: *Provided, further,* That the District shall not be obligated to accept more than fifty-five thousand (55,000) acre-feet of Class 2 water during any period of thirty (30) consecutive calendar days.

(c) In the event the studies now being conducted by the Bureau of Reclamation and the District with reference to the supplemental water needs of the District, and which studies are to be completed within two years after the date of the execution of this contract, indicate that the quantities of water actually necessary for an adequate supplemental supply for the District are in excess of or less than the amount provided for herein, the appropriate figures set forth in subdivisions (a), (b)(i), and (b)(ii) of this article shall be amended so as to conform with the results of the aforesaid studies.

TIME FOR DELIVERY OF WATER

4. (a) The District shall submit in writing to the contracting officer on or before March 1 of each year a schedule, subject to the provisions of Article 3 hereof and satisfactory to the contracting officer, indicating the desired times and quantities for the delivery of all Class 1 and Class 2 water pursuant to this contract during such year and the United States shall within the provisions hereof attempt to deliver said water in accordance with said schedule, or any provision thereof satisfactory to the contracting officer submitted by the District within a reasonable time before the desired change of the time for delivery, as nearly as may be feasible as conclusively determined by the contracting officer: *Provided,* That no

water will be furnished or delivered by the United States to the District during the months of December and January of any year unless notice to the contrary is furnished to the District on or before October 2 of the respective year.

(b) The District may, with the advance written consent of the contracting officer, in any year exchange water for irrigation purposes with any other district which has contracted with the United States for water from the Project. No sale or other disposal by the District for use outside the District of any water, or the right to the use thereof, furnished to the District pursuant to this contract shall be valid without the contracting officer's written consent thereto: *Provided*, That the District may, without such consent, contract with any party or parties for compensation to the District for benefits which may accrue to lands outside the District as a result of the District's operations in furnishing water to lands within its boundaries: *Provided, further*, That each such contract for compensation shall be expressly subject to the rights of the United States, pursuant to Article 7(c) hereof, to recover waste, seepage, and return flow water.

RATE AND METHOD OF PAYMENT FOR WATER

5. (a) The contracting officer will, on or before February 15 of each calendar year, by written notice, notify the District of the rates of payment to be made by the District for all water to be delivered to it pursuant to this contract during the ensuing year, but in no event shall the rates so announced be in excess of three dollars and fifty cents ($3.50) per acre-foot for Class 1 water and

one dollar and fifty cents ($1.50) per acre-foot for Class 2 water.

(b) The District shall, each year during the period described in Article 3(a) hereof, in advance of the commencement of delivery of each class of water for said year make shipment for all of the respective class of water requested by the District in the schedule submitted as aforesaid at the rates fixed in the manner provided in (a) of this article.

(c) During the period described in Article 3(b), the District shall, each year in advance of the commencement of delivery of each of the respective classes of water for said year, make payment to the United States, at rates fixed as provided in (a) of this article for the quantity of such class of water which the District is required to receive pursuant to the provisions of said Article 3(b). Such payments by the District shall be made on or before July 1 or such other date, prior to the time for commencement of delivery of such water, of the respective year as may be specified by the contracting officer in written notice to the District.

(d) In the event the District fails or refuses to accept delivery of the quantities of water available for delivery to and required to be accepted by it pursuant to this contract, or in the event the District in any year, during the period described in Article 3(b), fails to submit a schedule for delivery as provided in Article 4(a) of this contract, said failure or refusal shall not relieve the District of its obligation to pay for said water and the District agrees to make payment therefor in the same manner as if

said water had been delivered to and accepted by it in accordance with this contract.

(e) Water furnished to the District during any month designated in the schedule submitted by it pursuant to Article 4, for the furnishing of water to the District, shall be deemed to have been accepted as Class 1 water to the extent that Class 1 water is called for in said schedule for said month and all water furnished to the District in excess of the amount of Class 1 water called for in said schedule for said month shall be deemed to have been accepted as Class 2 water. Water available for furnishing to the District in accordance with the approved schedule and not accepted by the District shall be deemed to have been accepted by the District in accordance with the aforesaid schedule.

ADJUSTMENTS

6. The amount of any overpayment by the District by reason of the quantity of water actually available for the District during any year, as conclusively determined by the contracting officer, having been less than the quantity of such water which the District otherwise under the provisions of this contract would have been required to receive and pay for, shall be applied first to any accrued indebtedness arising out of this contract then due and owing to the United States by the District and any amount of such overpayment then remaining shall, at the option of the District, be refunded to the District or credited upon amounts to become due to the United States from the District under the provisions hereof in the ensuing year.

POINT OF DELIVERY, MEASUREMENT AND RESPONSIBILITY FOR DISTRIBUTION OF WATER

7. (a) The water to be furnished to the District pursuant to this contract will be delivered at Friant-Kern Canal at such points as may be mutually agreed upon in writing by the contracting officer and the District: *Provided*, however, That in the event the United States shall have reached the construction of the portion of the Friant-Kern Canal, which probably will embrace such points, and the location has not been so agreed upon, such points shall be established at locations as, in the conclusive determination of the contracting officer, will best serve the needs of the District.

(b) All water delivered pursuant to this contract shall be measured by the United States at each point of delivery established pursuant to (a) of this article and with equipment installed, operated, and maintained by the United States. Upon the request of the District, the accuracy of such measurements will be investigated by the contracting officer and any errors appearing therein adjusted.

(c) The United States shall not be responsible for the control, carriage, handling, use, disposal, or distribution of water which may be furnished to the District hereunder, outside the facilities then being operated and maintained by the United States, nor for claim of damage of any nature whatsoever, including but not limited to property damage, personal injury or death, arising out of or connected with the control, carriage, handling, use, disposal or distribution of such water outside of such

facilities: *Provided,* That the United States reserves the right to all waste, seepage, and return flow water derived from water furnished to the District hereunder and which escapes or is discharged beyond the District's boundaries and nothing herein shall be construed as an abandonment or a relinquishment by the United States of any such water, but this shall not be construed as claiming for the United States any right, as waste, seepage, or return flow, to water being used pursuant to this contract for surface irrigation or underground storage within the District's boundaries by the District or those claiming by, through, or under the District.

(d) Notwithstanding any provision of this contract to the contrary, the United States shall not be obligated to furnish either Class 1 or Class 2 water to the District pursuant hereto unless and until the construction by the United States of facilities to the extent required for furnishing of the respective class of water to the District has been completed as conclusively determined by the contracting officer.

(e) The United States may temporarily discontinue or reduce the amount of water to be furnished to the District as herein provided for the purposes of such investigation, inspection, maintenance, repair, or replacement as may be necessary of any of the Project facilities necessary for the furnishing of water to the District or any part thereof but so far as feasible the United States will give the District due notice in advance of such temporary discontinuance or reduction, except in case of emergency, in which case no notice need be given. In the event of any such discontinuance or reduction, the United States will, upon the resumption of service, approximate,

as nearly as may be feasible, the quantity of water which would have been furnished to the District in the absence of such contingency.

UNITED STATES NOT LIABLE FOR WATER SHORTAGE

8. (a) There may occur at times a shortage during any year in the quantity of water available for furnishing to the District by the United States pursuant to this contract through and by means of the Project and in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought or unavoidable causes. In no event shall the United States (A) deliver from Friant Dam in any year any Class 2 water pursuant to this or any other contract heretofore or hereafter entered into involving the same Project water supply, until the contracting officer shall have determined that the quantity of Class 1 water required to be delivered to the District from Friant Dam hereunder and to others under any such other contract will be available for delivery in said year, nor (B) execute contracts which, together with this contract, shall in the aggregate provide for furnishing during the life of this contract Class 1 water from Friant Dam in excess of eight hundred thousand (800,000) acre-feet per year. In any year in which there may occur a shortage from any cause, the United States reserves the right to apportion the available water supply among the District and others entitled, under existing and future contracts, to receive Class 1 water from Friant Dam in accordance with conclusive determination of the contracting officer as follows:

(i) A determination shall be made of the total quantity of Class 1 water agreed to be accepted during the respective year under all contracts then in force for the delivery of Class 1 water through Friant-Kern and Madera Canals and the San Joaquin River from Friant Dam, the amount so determined being herein referred to as the Class 1 contractual commitments.

(ii) A determination shall be made of the total quantity of Class 1 water at Friant Dam which is available for meeting Class 1 contractual commitments, the amount so determined being herein referred to as the available supply.

(iii) The total quantity of Class 1 water agreed to be accepted by the District during the respective year, under Article 3 hereof, shall be divided by the Class 1 contractual commitments, the quotient thus obtained being herein referred to as the District's contractual entitlement.

(iv) The available supply shall be multiplied by the District's contractual entitlement and the result shall be the quantity of water required to be delivered by the United States to the District for the respective year, but in no event shall such amount exceed the total quantity of Class 1 water agreed to be accepted by the District pursuant to Article 3 hereof.

In so far as determined by the contracting officer to be practicable, the United States will, in the event a shortage appears probable, notify the District of such determinations in advance of the irrigation season.

(b) If there only is available, as determined by the contracting officer, for furnishing to the District pursuant to this contract less than the quantity of Class 2 water which the District otherwise would be entitled to receive

pursuant to Article 3 hereof, the quantity of Class 2 water which shall be furnished to the District by the United States will be determined in the manner set forth in paragraphs (i), (ii), (iii), and (iv) of subdivision (a) of this article for apportioning Class 1 water in the event of a shortage.

(c) In the event that in any year there is delivered to the District, by reason of any shortage or apportionment, as provided in subdivision (a) or (b) of this article, or any discontinuance or reduction of service as set forth in Article 7(e) hereof, less than the quantity of water which the District otherwise would be entitled to receive hereunder, there shall be made an adjustment on account of the amounts paid to the United States by the District for Class 1 and Class 2 water for said year, in a manner similar to that provided for in Article 6 hereof. To the extent of such deficiency, such adjustment shall constitute the sole remedy of the District or any one having or claiming to have by, through, or under the District, the right to the use of any of the water supply provided for herein. The United States does not guarantee the furnishing and delivery of any Class 2 water and such Class 2 water will be furnished and delivered to the District only if, as, and when said water is available for delivery to the District as conclusively determined by the contracting officer.

~~(8) The rights of the District under this contract are subject to the terms of the Contract for Exchange of Waters dated July 27, 1939, between the United States and the San Joaquin and Kinge River Canal and Irrigation Company, Incorporated, and others, and recorded on the~~

18th day of September 1932, in the office of the County Recorder of

(i) Fresno County in Book 1810 of Official Records at Page 50;

(ii) Stanislaus County in Book 704 of Official Records at Page 1;

(iii) Merced County in Book 623 of Official Records at Page 417;

(iv) Madera County in Book 247 of Official Records at Page 113.

USE OF WATER FURNISHED TO DISTRICT

9. The District agrees that water furnished to it by the United States pursuant to this contract will not be delivered or furnished by the District for any purpose other than agricultural purposes, including but not restricted to the watering of stock, or underground water replenishment without the written consent of the contracting officer.

AGREED CHARGES A GENERAL OBLIGATION OF THE DISTRICT

10. The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the individual default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District.

ALL BENEFITS CONDITIONED UPON PAYMENT

11. Should any assessment or assessments required by the terms of this contract and levied by the District

against any tract of land or water user in the District be judicially determined to be irregular or void or should the District or its officers be enjoined or restrained from making or collecting any assessments upon such land or from such water user as provided for herein, then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant hereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rates and upon the terms and conditions provided for herein is a prerequisite to the right to water furnished to the District pursuant to this contract; and no irregularity in levying taxes or assessments by the District, nor lack of authority in the District, whether affecting the validity of District taxes or assessments or not, shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract, unless charges at the rates and upon the terms and conditions provided for herein have been paid by such water user.

LEVY OF TAXES AND ASSESSMENTS— FIXING OF RATES AND TOLLS

12. The District will cause to be levied and collected all necessary taxes and assessments and will use all of the

authority and resources of the District to meet its obligations hereunder, to make in full all payments to be made pursuant to this contract on or before the date such payments become due and to meet its other obligations under this contract. The District may, either or both, require the payment of toll charges or levy assessments for such water or service. All assessments levied by the District to meet the obligations accruing under this contract shall, unless otherwise determined by the Board of Directors of the District, be upon an *ad valorem* basis.

REFUSAL OF WATER IN CASE OF DEFAULT

13. No water shall be furnished to the District or by the District to or for the use of any lands or parties therein during any period in which the District may be in arrears in the advance payment of charges accruing under this contract. No water shall be furnished to or by the District pursuant to this contract for lands or parties which are in arrears in the payment to the District of any assessments, rates, tolls, or rental charges of the District levied or established by the District and necessary for the purpose of raising revenues to meet the payment by the District to the United States of the District's obligation under this contract. The provisions of this article are not exclusive and action taken pursuant hereto shall not prejudice or preclude the United States from exercising any other remedy to enforce collection of any amounts due hereunder.

PENALTY UPON DELINQUENCY IN PAYMENT

14. Upon each charge to be paid by the District to the United States pursuant to this contract which shall

remain unpaid after the same shall have become due and payable, there shall be imposed a penalty of one-half (1/2) of one (1) percent per month of the amount of such delinquent installment from and after the date when the same becomes due until paid, and the District hereby agrees to pay said penalty: *Provided*, That the penalty shall be chargeable against the net amount of any adjustment made pursuant to Article 6 hereof.

DISTRICT TO KEEP BOOKS AND RECORDS AND REPORT CROP AND OTHER DATA

15. The District shall establish and maintain account and other books and records sufficient to enable it to furnish, in so far as the District is permitted to do so by the laws of the State of California, to the Bureau of Reclamation reports and statements to such extent and in such manner and form as may be prescribed by the United States as to information pertaining to (a) accounts and financial transactions of the District, in so far as such information pertains to this contract and operations thereunder, (b) crops raised and agricultural and livestock products produced on the lands within the District, a report thereon to be furnished to the contracting officer annually on or before December 31.

INSPECTION OF BOOKS AND RECORDS

16. Subject to applicable Federal laws and regulations, the proper officer or agents of the District shall have full and free access at all reasonable times to the Project account books and official records of the Bureau of Reclamation, in so far as the same pertain to the

matters and things provided for in this contract, with the right at any time during office hours to make copies thereof, and the proper representatives of the United States shall have similar rights in respect to the account books and records of the District.

CHANGES IN ORGANIZATION OF DISTRICT

17. (a) While this contract is in effect no change will be made in the District either by inclusion or exclusion of lands, by partial or total consolidation or merger with another district, by proceedings to dissolve, or otherwise, except upon the contracting officer's written assent thereto.

(b) In event lands are annexed to or excluded from the District as provided herein, the parties hereto may by supplemental agreement increase or decrease the quantity of water which is to be furnished by the United States to the District and which the District is required to receive and pay for pursuant to this contract.

LAND NOT TO RECEIVE WATER FURNISHED TO DISTRICT BY UNITED STATES UNTIL OWNERS THEREOF EXECUTE CERTAIN CONTRACTS

18. (a) No water made available pursuant to this contract shall be furnished to any excess lands as defined in Article 20 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States, agreeing to the provisions of Articles 18, 19, and 20 of this contract; agreeing to the appraisal provided for in Article 19 hereof and that such appraisal shall be made on the basis of the actual bona fide value of

such lands at the date of the appraisal without reference to the construction of the Project, all as hereinafter provided; and agreeing to the sale of his excess lands under terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed as hereinafter provided. No sale of any excess lands shall carry the right to receive water made available pursuant to this contract unless and until the purchase price involved in such sale is approved by the contracting officer, and upon proof of fraudulent representation as to the true consideration involved in such sale the United States may instruct the District by written notice to refuse to furnish any water subject to this contract to the land involved in such fraudulent sales and the District thereafter shall not furnish said water to such lands.

(b) If Project water furnished to the District pursuant to this contract reaches the underground strata of excess land owned by a large land owner who has not executed a recordable contract and the large land owner pumps such Project water from the underground, the District will not be deemed to have furnished such water to said lands within the meaning of this contract if such water reached the underground strata of the aforesaid excess land as an unavoidable result of the furnishing of Project water by the District to non-excess lands or to excess lands with respect to which a recordable contract has been executed.

~~VALUATION AND SALE OF EXCESS LANDS~~

19. (a) ~~The value of the excess~~ irrigable lands ~~within~~ the District, held in private ownership ~~of large~~

land owners as defined in the part succeeding article hereof, for the purposes of this contract, shall be determined, subject to the approval thereof by the Secretary, by three appraisers. One of said appraisers shall be designated by the Secretary and one shall be designated by the District and the two appraisers so appointed shall name the third. If the appraisers so designated by the Secretary and the District are unable to agree upon the appointment of the third, the presiding justice of the Fourth District Court of Appeal of the State of California shall be requested to designate the third appraiser.

(b) The following principles shall govern the appraisal:

(i) No value shall be given such lands on account of the existing or prospective possibility of securing water from the Project.

(ii) The value of improvements on the land at the time of said appraisal shall be included therein, but shall also be set forth separately in such appraisal.

(c) The cost of the first two appraisals and each subsequent appraisal requested by the United States shall be paid by the United States.

(d) Any improvements made or placed on the appraised land after the appraisal hereinabove provided for prior to sale of the land by a large land owner may be appraised in like manner.

(e) Excess irrigable lands sold by large land owners within the District shall not carry the right to receive water made available pursuant to this contract for such lands and the District agrees to refuse to furnish such

water to lands so sold until, in addition to compliance with the other provisions hereof, a verified statement showing the sale price upon any such sale shall have been filed with the District.

(f) The District agrees to take all reasonable steps requested by the contracting officer to ascertain the occurrence and conditions of all sales of irrigable land of large land owners in the District and to inform the United States concerning the same.

(g) A true copy of this contract and of each appraisal made pursuant thereto shall be maintained on file in the office of the District and like copies in such principal offices of the Bureau of Reclamation as may be established hereafter in connection with the Project and shall be made available for examination during the usual office hours by all persons who may be interested therein.

EXCESS LANDS

20. (a) As used herein the term "excess land" means that part of the irrigable land within the District in excess of one hundred and sixty (160) acres held in the beneficial ownership of any private individual, whether a natural person or a corporation. With respect to land held in co-ownership, such as partnership, tenancy in common, joint tenancy, or community property, the beneficial ownership of each co-owner shall be that fraction of the total acreage held in co-ownership which equals the co-owner's fractional interest therein. The term "large land owner" means an owner of excess lands, and the term "nonexcess land" means all irrigable land within the District which is not excess land as defined herein. The term

"excess land" shall not include land owned by the District.

(b) Each large land owner as a further condition precedent to the right to receive water made available pursuant to this contract for any of his excess land shall:

(i) Before any water is furnished by the District to his excess land, execute a valid recordable contract in form prescribed by the United States, agreeing to the provisions herein contained in Articles 18, 19, and 20 and agreeing to dispose of his excess land in accordance therewith to persons who can take title thereto as nonexcess land as herein provided and at a price not to exceed the approved, appraised value of such excess land and within a period of ten (10) years after the date of the execution of said recordable contract and agreeing further that if said land is not so disposed of within said period of ten (10) years the Secretary shall have the power to dispose of said land subject to the same conditions on behalf of such large land owner; and the District agrees that it will refuse to furnish said water to any large land owner other than for his nonexcess land until such owner meets the conditions precedent herein stated.

(ii) Within thirty (30) days after the date of notice from the United States requesting such large land owner to designate his irrigable lands under the Project which he desires to designate as nonexcess land, file in the office of the District, in duplicate, one copy thereof to be furnished by the District to the Bureau of Reclamation, his written designation and description of lands so selected to be nonexcess land and upon failure to do so the District shall make such designation and mail a notice thereof to such large land owner, and in the event the

District fails to act within such period of time as the contracting officer considers reasonable, such designation will be made by the contracting officer, who will mail a notice thereof to the District and the large land owner. The large land owner shall become bound by any such action on the part of the District or the contracting officer and the District will furnish said water only to the land so designated to be nonexcess land. A large land owner may, with the consent of the contracting officer, designate land other than that previously designated as nonexcess land: *Provided*, That an equal acreage of the land previously designated as nonexcess shall, upon such new designation, become excess land thereafter subject to the provisions of Articles 18, 19, and 20 of this contract, and shall be described in an amendment of such recordable contract as may have been executed by the large land owner, in the same manner as if such land had been excess land at the time of the original designation.

AMENDMENT OF FEDERAL RECLAMATION LAWS

21. In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, Articles 18, 19, and 20 of this contract will no longer be of any force or effect, and, in the event that the Congress amends the excess-land provisions or other provisions of the Federal reclamation laws the United States agrees, at the option of the District, to negotiate amendments of appropriate articles of this contract, all consistently with the provisions of such repeal or amendment.

CONTINGENT UPON APPROPRIATIONS OR ALLOTMENTS OF FUNDS

22. The expenditure of any money or the performance of any work by the United States herein provided for which may require appropriations of money by the Congress or the allotment of funds, shall be contingent upon such appropriations or allotments being made. The failure of the Congress so to appropriate funds or the failure of an allotment of funds shall not relieve the District from any obligations then accrued under this contract and no liability shall accrue to the United States in case such funds are not appropriated or allotted.

OFFICIALS NOT TO BENEFIT

23. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

NOTICES

24. Any notice or announcement which the provisions hereof contemplate shall be given to one of the partier hereto by the other shall be deemed to have been given if deposited in the United States Post Office, on the part of the United States in a franked envelope addressed to the District at its office and on the part of the District in a postage pre-paid envelope addressed to the Bureau of Reclamation, Department of the Interior, Sacramento, California, or such other address as from time to time

may be designated by the contracting officer in a written notice to the District: *Provided*, however, That this article shall not preclude the effective service of any such notice or announcement by other means.

ASSIGNMENT PROHIBITED: SUCCESSORS AND ASSIGNS OBLIGATED: DEFAULT

25. The provisions of this agreement shall apply to and bind the successors and assigns of the respective parties, but no assignment or transfer of this contract or any part thereof or interest therein shall be valid until and unless approved by the United States. Any waiver at any time by either party to this contract of its rights with respect to a default, or any other matter arising in connection with this contract, shall not be deemed to be a waiver with respect to any subsequent default or matter. All rights of action for breach of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States as amended (41 U.S.C. 15).

WATER ACQUIRED BY DISTRICT OTHER THAN FROM THE UNITED STATES

26. (a) The provisions of this contract shall not be applicable to or affect water or water rights now owned or hereafter acquired by the District other than from the United States. Water furnished by the United States to the District pursuant to this contract must of necessity be transported by the District from the point of delivery established pursuant to Article 7 of this contract by means of the same works and channels as water now

owned, or which may hereafter be acquired, by the District other than pursuant to the terms of this contract. Notwithstanding such mingling of water, the provisions of this contract shall be applicable to the quantity of water furnished to the District pursuant to the terms hereof, and such mingling of water shall not in any manner subject to the provisions of this contract the quantity of water acquired by or available to the District other than from the United States.

(b) The District will provide and maintain separate outlets from its distribution system for non excess and excess lands as defined in Article 20. At the request of the contracting officer the District will install, operate and maintain water measuring equipment at delivery points to excess lands and, further, will install similar equipment for measuring the water available to the District other than from the Project and the contracting officer may check and inspect said equipment at any time.

(c) The District agrees that the quantity of water furnished to it by the United States during each 24-hour period will be delivered by the District only to nonexcess land, through the aforesaid outlets to nonexcess lands, or to spreading basins. The District shall be deemed to be in breach of Articles 18, 19, and 20 of this contract if at any time there is furnished to all excess lands a quantity of water which is greater than that which the District would have had available to it for furnishing to all land within the District in the absence of the Project supply furnished by the United States pursuant to this contract.

ASSURANCE RELATING TO VALIDITY OF CONTRACT

27. Promptly after the execution and delivery of this contract the District shall file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval and confirmation of the proceedings of the District Board of Directors and of the District leading up to and including the making of this contract and the validity of the provisions thereof, as provided for by Section 23225 of the Water Code of California (St. 1943, Ch. 368, Div. 11, Part 6, Chap. 2; Art. 3, Sec. 23225, approved May 13, 1943).

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their names the day and year hereinabove written.

THE UNITED STATES OF AMERICA

By /s/ Richard L. Boke
Regional Director, Region 2
Bureau of Reclamation
U.S. Department of the Interior

LOWER TULE RIVER
IRRIGATION DISTRICT

By /s/ Anton Simonich
President

(Seal)

Attest:

/s/ Norman E. Vossler
Secretary

Contract No. I75r-2772
Amendatory

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

AMENDATORY CONTRACT BETWEEN THE UNITED STATES AND THE LOWER TULE RIVER IRRIGATION DISTRICT

FILED
7/5/62

THIS CONTRACT, made this 10th day of February, 1954, in pursuance generally of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively herein styled the Federal reclamation laws, between the UNITED STATES OF AMERICA, herein styled the United States, represented by the Secretary of the Interior, and the LOWER TULE RIVER IRRIGATION DISTRICT, a political subdivision of the State of California, duly organized, existing and acting pursuant to the laws thereof, with its principal place of business in Woodville, in the County of Tulare, State of California, herein styled the District.

WITNESSETH, THAT:

WHEREAS, the United States and the District on the 1st day of May, 1951, entered into a contract designated by symbol and number I75r-2771, which provided for the furnishing of a water supply to the District from the Central Valley Project; and

WHEREAS, it is in the best interests of the United States and the District to make certain changes in said

contract of May 1, 1951, to facilitate operations thereunder;

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein contained and as set forth in said contract of May 1, 1951, it is hereby mutually agreed between the parties hereto as follows:

1. Article 4 of said contract of May 1, 1951, is hereby amended to read as follows:

"4. (a) On or before February 15 of each calendar year, the contracting officer shall, by a written notice to the District, announce the quantity of Class 2 water estimated to be available for delivery to the District during the year immediately to follow. The contracting officer may revise the aforesaid estimate but, upon doing so, he shall so notify the District in writing and the District, during the period described in, and to the extent it is required to accept and pay for Class 2 water pursuant to, Article 3(b) hereof, shall be obligated to accept and pay for the additional quantities so announced by the contracting officer to be available for the District.

"(b) The District shall submit in writing to the contracting officer on or before March 1 of each year a schedule, subject to the provisions of Article 3 hereof and satisfactory to the contracting officer, indicating the desired times and quantities for the delivery of all Class 1 and Class 2 water pursuant to this contract during such year and the United States shall within the provisions hereof attempt to deliver said water in accordance with said schedule, or any revision thereof satisfactory to the contracting officer submitted by the District within a reasonable time before the desired change of the time for

delivery, as nearly as may be feasible as conclusively determined by the contracting officer: *Provided*, That no water will be furnished or delivered by the United States to the District during the months of December and January of any year unless notice to the contrary is furnished to the District on or before October 1 of the respective year.

"(c) The District may, with the advance written consent of the contracting office, in any year exchange water for irrigation purposes with any other district which has contracted with the United States for water from the Project. No sale or other disposal by the District for use outside the District of any water, or the right to the use thereof, furnished to the District pursuant to this contract shall be valid without the contracting officer's written consent thereto: *Provided*, That the District may, without such consent, contract with any party or parties for compensation to the District for benefits which may accrue to lands outside the District as a result of the District's operations in furnishing water to lands within its boundaries: *Provided further*, That each such contract for compensation shall be expressly subject to the rights of the United States, pursuant to Article 7(c) hereof, to recover waste, seepage, and return flow water."

2. Article 5 of said contract of May 1, 1951, is hereby amended to read as follows:

"5. (a) The contracting officer will, on or before February 15 of each calendar year, by written notice, notify the District of the rates of payment to be made by the District for all water to be delivered to it pursuant to this contract during the ensuing year, but in no event

shall the rates so announced be in excess of three dollars and fifty cents ($3.50) per acre-foot for Class 1 water and one dollar and fifty cents ($1.50) per acre-foot for Class 2 water.

"(b) The District shall, each year during the period described in Article 3(a) hereof, make payments to the United States in the manner described in subdivision (d) of this article for all Class 1 and Class 2 water requested by the District in the schedule submitted as aforesaid at the rates fixed in the manner provided in (a) of this article.

"(c) During the period described in Article 3(b), the District shall each year make payments to the United States in the manner described in subdivision (d) of this article for all water to be furnished to the District pursuant to Article 3(b) at rates fixed as provided in (e) of this article.

"(d) Payment for water shall be made at the times and in the manner as follows:

> "(i) For all water to be furnished during the period described in Article 3(a) hereof, for all Class 1 water which the District is required to receive pursuant to the provisions of Article 3(b), and for all Class 2 water which the contracting officer prior to March 1 of said year has announced will be available to the District and which the District is required to receive and pay for pursuant to Article 3(b), the District shall pay one-half of the amount payable for said water for the year on or before March 1 and shall pay the remainder of the amount payable for said water for the year on or before July 1: *Provided*, That each said date of payment may be changed by the contracting officer, in a written

notice to the District, to a later date of the respective year: *Provided further,* That whenever the amount of water furnished to the District equals the amount for which payment has been made, as herein provided, the District will pay in advance of any further delivery of water for the total amount of water to be furnished to it until the next payment is due.

"(ii) For all Class 2 water actually available in excess of that originally announced by the contracting officer and which the District is required to receive pursuant to the second sentence of Article 4(a), the District shall pay the amount payable for said water in the same manner as is provided for the payment for water in paragraph (i) above, except that the first payment for said water shall be made before the delivery of any of said Class 2 water.

"(e) In the event the District fails or refuses to accept delivery of the quantities of water available for delivery to and required to be accepted by it pursuant to this contract, or in the event the District in any year, during the period described in Article 3(b), fails to submit a schedule for delivery as provided in Article 4(b) of this contract, said failure or refusal shall not relieve the District of its obligation to pay for said water and the District agrees to make payment therefor in the same manner as if said water had been delivered to and accepted by it in accordance with this contract.

"(f) Water furnished to the District during any month designated in the schedule submitted by it and accepted as satisfactory by the contracting officer pursuant to Article 4(b) hereof, for the furnishing of water to the District, shall be deemed to have been accepted as Class 1 water to the extent that Class 1 water is called for

in said schedule for said month and all water furnished to the District in excess of the amount of Class 1 water called for in said schedule for said month shall be deemed to have been accepted as Class 2 water to the extent that Class 2 water is called for in said schedule. Water available for furnishing to the District in accordance with the approved schedule and not-accepted by the District shall be deemed to have been accepted by the District in accordance with the aforesaid schedule. If the District during any month is furnished an amount of water in addition to that which it has requested for such month in its said schedule and accepted such additional water, the District shall be deemed to have revised its schedule to call for such additional water during such month, and the United States shall be deemed to have accepted such revision as satisfactory. In such event, said additional water shall be deemed to have been furnished and accepted as Class 2 water to the extent that Class 2 water is called for during the remainder of the year in the schedule submitted by the District and accepted as satisfactory by the contracting officer pursuant to Article 4(b) and shall be deemed to have been furnished and accepted as Class 1 water to the extent that Class 2 water is not so called for in said schedule. As soon thereafter as possible, the District shall submit a revised schedule to the United States, indicating during what subsequent month or months of the year the amount of Class 1 or Class 2 water, or both, to be furnished is to be reduced in order that the total amount of water of each class to be furnished during said year shall remain the same."

3. Article 9 of said contract of May 1, 1951, is hereby amended to read as follows:

"9. The District agrees that water furnished to it by the United States pursuant to this contract will not be delivered or furnished by the District for any purpose other than agricultural purposes, including but not restricted to domestic use incidental to such agricultural purposes, the watering of stock, and underground water replenishment, without the written consent of the contracting officer."

4. Article 14 of said contract of May 1, 1951, is hereby amended to read as follows:

"14. Upon each charge to be paid by the District to the United States pursuant to this contract which shall remain unpaid after the same shall have become due and payable, there shall be imposed a penalty of one-half (1/2) of one (1) percent per month of the amount of such delinquent installment from and after the date when the same becomes due until paid, and the District hereby agrees to pay said penalty: *Provided,* That no penalty shall be chargeable against the net amount of any adjustment made pursuant to Article 6 hereof: *Provided further,* That no penalty shall be charged to or be paid by the District unless such delinquency continues for more than thirty (30) days."

5. Subdivision (a) of Article 19 of said contract of May 1, 1951, is hereby amended to read as follows:

"(a) The value of the excess irrigable lands within the District, held in private ownership of large land owners as defined in the next succeeding article hereof, for the purposes of this contract, shall be appraised in a manner to be prescribed by the Secretary of the Interior. At the option of the large land owner,

however, the value of such land may be appraised, subject to the approval thereof by the Secretary, by three appraisers. One of said appraisers shall be designated by the Secretary and one shall be designated by the District, and the two appraisers so appointed shall name the third. If the appraisers so designated by the Secretary and the District are unable to agree upon the appointment of the third, the presiding justice of the Fourth District Court of Appeal of the State of California shall be requested to designate the third appraiser."

6. Subdivision (c) of Article 19 of said contract of May 1, 1951, is hereby amended as follows:

"(c) The excess land of any large land owner shall be reappraised at the instance of the United States or at the request of said land owner. The cost of the first two appraisals and each subsequent appraisal requested by the United States shall be paid by the United States. The cost of each appraisal thereafter shall be paid by the party requesting such appraisal."

7. Subdivision (g) of Article 19 of said contract of May 1, 1951, is hereby amended to read as follows:

"(g) A true copy of this contract, of each recordable contract executed pursuant to Articles 18, 19, and 20 hereof, and of each appraisal made pursuant thereto shall be furnished to the District by the United States, and shall be maintained on file in the office of the District, and like copies in such principal offices of the Bureau of Reclamation as may be established hereafter in connection with the Project and shall be made available for examination during the usual office hours by all persons who may be interested therein."

8. Subdivision (b)(i) of Article 20 of said contract of May 1, 1951, is hereby amended to read as follows:

"(i) Before any water is furnished by the District to his excess land, execute a valid recordable contract in form prescribed by the United States, agreeing to the provisions herein contained in Articles 18, 19, and 20, and agreeing to dispose of his excess land in accordance therewith to persons who can take title thereto as nonexcess land as herein provided and at a price not to exceed the approved, appraised value of such excess land and within a period of ten (10) years after the date of the execution of said recordable contract, and agreeing further that if said land is not so disposed of within said period of ten (10) years, the Secretary shall have the power to dispose of said land at the appraised value thereof fixed as provided herein, or such lower price as may be approved by the owner of such land, subject to the same conditions on behalf of such large land owner; and the District agrees that it will refuse to furnish said water to any large land owner, other than for his nonexcess land, until such owner meets the conditions precedent herein stated."

9. Article 25 of said contract of May 1, 1951, is hereby amended to read as follows:

"ASSIGNMENT PROHIBITED: SUCCESSORS AND ASSIGNS OBLIGATED: DEFAULT: OPINIONS AND DETERMINATIONS

"25. (a) The provisions of this agreement shall apply to and bind the successors and assigns of the respective parties, but no assignment or transfer of this contract or any part thereof or interest therein shall be

valid until and unless approved by the United States. Any waiver at any time by either party to this contract of its rights with respect to a default, or any other matter arising in connection with this contract, shall not be deemed to be a waiver with respect to any subsequent default or matter. All rights of action for breach of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States as amended (41 U.S.C. 15).

"(b) Where the terms of this contract provide for action to be based upon the opinion or determination of either party to this contract, said terms shall not be construed as permitting such actions to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations."

10. Except as herein modified, said contract of May 1, 1951, shall be and remain in full force and effect as originally written and executed.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their names the day and year hereinabove written.

THE UNITED STATES OF AMERICA

By /s/ [Illegible]
Regional Director, Region 2
Bureau of Reclamation

LOWER TULE RIVER IRRIGATION DISTRICT

By /s/ Anton Simonich
President

(SEAL)

Attest:)

/s/ M W Lelhey
Secretary

Sacramento Office
Draft No. 2
July 19, 1956

Contract No. I75r-2771
Amendatory

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

AMENDATORY CONTRACT BETWEEN THE UNITED STATES AND THE LOWER TULE RIVER IRRIGATION DISTRICT

THIS CONTRACT, made this 23rd day of January, 1957, in pursuance generally of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively herein styled the Federal reclamation laws, between THE UNITED STATES OF AMERICA, herein styled the "United States", represented by the Secretary of the Interior, and the LOWER TULE RIVER IRRIGATION DISTRICT, a political subdivision of the State of California, duly organized, existing and acting pursuant to the laws thereof, with its principal place of business in Woodville, in the County of Tulare, State of California, herein styled the "District",

WITNESSESTH, THAT:

WHEREAS, the United States and the District on the 1st day of May, 1951, entered into a contract designated by symbol and number I75r-2771, which provided for the furnishing of a water supply to the District from the Central Valley Project; and

WHEREAS, said contract of May 1, 1951, was amended on the 10th day of February, 1954, to facilitate operations thereunder; and

WHEREAS, subdivision (c) of Article 3 of said contract of May 1, 1951, provides that in the event studies being conducted by the United States and the District with reference to the District's supplemental water requirements indicate that the water supply necessary for an adequate supplemental supply for the District is less than or in excess of the quantities set forth in said Article 3, said specified quantities shall be amended to conform with the results of said studies; and

WHEREAS, said studies have been completed and the District and the United States desire that the quantities of water specified in Article 3 of said contract of May 1, 1951, be amended to conform with the results of said studies; and

WHEREAS, land has been included in the District and the District desires and the United States is willing to increase the quantity of water to be furnished to the District pursuant to said contract of May 1, 1951, as amended by said contract of February 10, 1954;

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein contained and as

set forth in said contract of May 1, 1951, and said contract of February 10, 1954, it is mutually agreed as follows:

1. Article 3 of said contract of May 1, 1951, is hereby amended to read as follows:

"3. (a) Each year until the sixth year after the year in which the initial delivery date occurs or until the year following that in which Success Dam on the Tule River has been constructed and placed in operation, whichever is the longer period, the United States will furnish to the District and the District each such year will accept and pay, as provided in Article 5 hereof, for Class 1 and Class 2 water from the Friant-Kern Canal in the quantities specified in a schedule submitted by the District in accordance with Article 4(a), but in any event not more than sixty-one thousand two hundred (61,200) acre-feet of Class 1 water and two hundred thirty-eight thousand (238,000) acre-feet of Class 2 water, for each such year: *Provided*, That no Class 1 water shall be furnished to the District and the District shall not be obligated to accept and pay for Class 1 water until the date, announced by the contracting officer, that the facilities necessary for furnishing Class 1 water have been completed, and after said date no more than eighty (80) per cent of the total quantity of water called for by the District during any such year in the aforesaid schedule shall be Class 2 water, nor shall the United States be obligated to furnish more than sixty-one thousand two hundred (61,200) acre-feet of Class 1 water during any such year.

"(b) In the sixth year after the year in which the initial delivery date occurs or the first year after that in which Success Dam on the Tule

River has been constructed and placed in operation, whichever is the later, and each year thereafter during the remainder of the term of this contract, the United States shall furnish to the District and the District shall accept and pay for, as provided in Article 5 hereof:

"(i) sixty-one thousand two hundred (61,200) acre-feet of Class 1 water; and

"(ii) one hundred thousand (100,000) acre-feet of Class 2 water: *Provided*, That the District may, at any time or times within fifteen (15) years after the initial delivery date by written notice furnished to the United States on or before November 1, increase such maximum amount of Class 2 water to be furnished to it in the succeeding year and each year thereafter during the remainder of the term of this contract, but in no event shall the total amount of such Class 2 water to be furnished by the United States and accepted and paid for by the District in any year be in excess of two hundred thirty-eight thousand (238,000) acre-feet: *Provided further*, That the District shall not be obligated to accept more than forty-five thousand (45,000) acre-feet of Class 2 water during any period of thirty (30) consecutive calendar days."

2. (a) In connection with the performance of work under this contract, the District agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The District agrees to post hereafter in conspicuous places,

available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause.

(b) The District further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

3. Except as herein modified, said contract of May 1, 1951, as amended by said contract of February 10, 1954, shall be and remain in full force and effect as originally written and executed.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their names the day and year first hereinabove written.

THE UNITED STATES OF AMERICA

By /s/ [Illegible]
Regional Director, Region 2
Bureau of Reclamation

LOWER TULE RIVER IRRIGATION DISTRICT

By /s/ Anton Simonich
President

(SEAL)

Attest:

/s/ M W Lelhey
Secretary

R. O. Draft 9/29-1959
Contract No.
I75r-2771
Amendatory

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

AMENDATORY CONTRACT BETWEEN THE UNITED STATES AND THE LOWER TULE RIVER IRRIGATION DISTRICT

THIS CONTRACT, made this 15th day of October, 1959, in pursuance generally of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively herein styled the Federal reclamation laws, between THE UNITED STATES OF AMERICA, herein styled the United States, represented by the Secretary of the Interior, and the LOWER TULE RIVER IRRIGATION DISTRICT, a political subdivision of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with its principal place of business in Woodville, in the County of Tulare, State of California, herein styled the District.

WITNESSETH, That:

WHEREAS, the United States and the District on the 1st day of May 1951 entered into a contract designated by symbol and number I75r-2771, which provided for the furnishing of a water supply to the District from the Central Valley Project; and

WHEREAS, said contract of May 1, 1951, was amended on the 10th day of February 1954 to facilitate operations thereunder; and

WHEREAS, said contract of May 1, 1951, was further amended on the 23d day of January 1957 to further facilitate operations thereunder; and

WHEREAS, it is in the best interests of the United States and the District to make certain additional changes in said contract of May 1, 1951, as amended to further facilitate operations thereunder;

NOW, THEREFORE, in consideration of the mutual and dependent convenants herein contained and as set forth in said contract of May 1, 1951, said contract of February 10, 1954, and said contract of January 23, 1957, it is mutually agreed as follows:

1. The following subdivision (d) is hereby added to Article 4 of said contract of May 1, 1951, as amended February 10, 1954:

> "(d) The District may, at any time or times after November 1 of any year, request Class 1 and/or Class 2 water in excess of the quantities it is entitled to receive during any such year pursuant to Articles 3 and 8 hereof. Payment for the water so requested at the rate or rates announced by the contracting officer pursuant to Article 5 shall be made in advance of delivery of any such water. The United States shall deliver such water in accordance with a schedule or any revision thereof submitted by the District and approved by the contracting officer, to the extent such water is available and to the extent such deliveries will not interfere with maintenance of the Project. The quantities of water delivered pursuant to this subdivision (d) shall be deducted from the quantities of water the United States would otherwise be obligated to deliver and the District obligated to accept during the next succeeding year. Payments

made by the District pursuant to this subdivision (d) shall be deducted from the payments the District must make for the quantities of water the United States would otherwise be obligated to deliver and the District obligated to accept and pay for during the next succeeding year."

2. Except as herein modified, said contract of May 1, 1951, as amended by said contracts of February 10, 1954, and January 23, 1957, shall be and remain in full force and effect as originally written and executed.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their names the day and year first hereinabove written.

THE UNITED STATES OF AMERICA

By /s/ N P Dugan
Regional Director, Region 2
Bureau of Reclamation

LOWER TULE RIVER IRRIGATION DISTRICT

By /s/ Anton Simonich
President

(SEAL)

Attest:

/s/ W A Alyard
Secretary

R. O. Draft 3/6-1962
Contract No.
I75r-2771
Amendatory

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

AMENDATORY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE LOWER TULE RIVER IRRIGATION DISTRICT

THIS CONTRACT AMENDMENT, made this 18th day of April, 1962, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively hereinafter referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, and the LOWER TULE RIVER IRRIGATION DISTRICT, hereinafter referred to as the District, a political subdivision of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with its principal place of business in Woodville, in the County of Tulare, State of California,

WITNESSETH, That:

WHEREAS, the United States and the District on the 1st day of May, 1951, entered into a contract designated by symbol and number I75r-2771 which provides for the furnishing of a water supply to the District from the Central Valley Project; and

WHEREAS, said contract of May 1, 1951, was amended on the 10th day of February, 1954, and 23d day

of January, 1957, and the 15th day of October, 1959, to facilitate operations thereunder; and

WHEREAS, it is the policy of the United States to minimize use of San Joaquin River water in meeting its obligations to the Contracting Entities under the terms of a certain Contract for Exchange of Waters, dated July 27, 1939, as amended March 17, 1956, and its obligations to the owners of certain water rights under Schedule 2 of a certain Contract for Purchase of Miller & Lux Water Rights, dated July 27, 1939, to the extent that it may do so consistently with the terms of said contracts, and the United States is willing to give assurances requested by long-term contractors in the Millerton Lake service area of the continuation of the aforesaid policy; and

WHEREAS, it is in the best interests of the United States and the District to make certain additional changes in said contract of May 1, 1951, as amended, to further facilitate operations thereunder;

NOW, THEREFORE, in consideration of the mutual and dependent convenants herein contained and as set forth in said contract of May 1, 1951, as amended, it is agreed by the parties hereto as follows:

1. Article 2 of said contract of May 1, 1951, as amended, is hereby amended to read as follows:

"TERM OF CONTRACT

"2. This contract shall be effective from the date first hereinabove written and shall remain in effect for a period of forty (40) years: *Provided*, That under terms and conditions mutually agreeable to the parties hereto renewals of this contract may be made for successive periods not

to exceed forty (40) years each. The terms and conditions of each renewal shall be agreed upon not later than one (1) year prior to the expiration of the then existing contract: *Provided further,* That upon written request by the District of the Secretary not later than one (1) year prior to the expiration of this contract, whenever, account being taken of the amount then credited to the costs of construction of water supply works, the remaining amount of construction costs of water supply works which is properly assignable for ultimate return by the District as established by the Secretary of the Interior pursuant to (3) of Section 1 of Public Law 643 (70 Stat. 483) probably can be repaid to the United States within the term of a contract under subsection (d), Section 9 of the 1939 Reclamation Project Act (53 Stat. 1187), this contract may be converted to a contract under said subsection (d) upon terms and conditions mutually agreeable to the United States and the District."

2. Article 7 of said contract of May 1, 1951, as amended, is hereby amended by adding subdivision (f) as follows:

"(f) The right to the beneficial use of water furnished to the District pursuant to the terms of Article 3 and other applicable provisions of this contract and any renewal thereof shall not be disturbed so long as the District shall fulfill all of its obligations under this contract and any renewal thereof."

3. Subdivision (d) of Article 8 of said contract of May 1, 1951, as amended, is hereby amended to read as follows:

"(d) The rights of the District under this contract are subject to the terms of the Contract for Exchange of Waters, dated July 27, 1939,

between the United States and the San Joaquin and Kings River Canal and Irrigation Company, Incorporated, and others, and recorded on the 18th day of September, 1939, in the office of the County Recorder of:

"(i) Fresno County: in Book 1810 of Official Records at page 50;

"(ii) Stanislaus County in Book 704 of Official Records at page 1;

"(iii) Merced County in Book 623 of Official Records at page 417; and

"(iv) Madera County in Book 247 of Official Records at page 113;

as the same was amended March 17, 1956, and the United States agrees that it will not deliver to the Contracting Entities thereunder waters of the San Joaquin River unless and until required by the terms of said contract so to do, and the United States further agrees that it will not voluntarily and knowingly render itself unable to deliver to the parties entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under said Exchange Contract and under Schedule 2 of the Contract for Purchase of Miller & Lux Water Rights (Contract I1r-1145, dated July 27, 1939)."

4. The following Article 28 is hereby added to said contract of May 1, 1951, as amended:

"NONDISCRIMINATION

"28. In connection with the performance of work under this contract, the District agrees as follows:

"(a) The District will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The District will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The District agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

"(b) The District will, in all solicitations or advertisements for employees placed by or on behalf of the District, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(c) The District will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Contracting Officer, advising the said labor union or workers' representative of the District's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(d) The District will comply with all provisions of Executive Order No. 10925 of

March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

"(e) The District will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to its books, records, and accounts by the Contracting Officer and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(f) In the event of the District's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled in whole or in part and the District may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

"(g) The District will include the provisions of the foregoing subdivisions (a) through (f) of this article in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The

District will take such action with respect to any subcontract or purchase order as the Contracting Officer may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event the District becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Contracting Officer, the District may request the United States to enter into such litigation to protect the interests of the United States."

5. Except as herein modified, said contract of May 1, 1951, as amended, shall be and remain in full force and effect as originally written and executed.

ASSURANCE RELATING
TO VALIDITY OF CONTRACT

6. (a) Promptly after the execution and delivery of this amendatory contract the District shall file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and confirmation of the proceedings had for the organization of the District and the proceedings of the District Board of Directors and of the District leading up to and including the making of said contract of May 1, 1951, as heretofore and herein amended and the validity of the provisions thereof; and said contract as amended shall not be binding on the United States until said District organization, proceedings, and contract shall have been so confirmed by a court of competent jurisdiction or pending appellate action in any court if ground for appeal be laid: *Provided,* That nothing herein contained shall require the District to

assume the responsibility of prosecuting judicial review beyond the highest court of the State of California.

(b) The aforesaid contract as amended shall be indivisible for purposes of validation and shall not be binding on the United States or the District unless validated in each and all of its terms and conditions as executed by the parties.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be duly executed the day and year first hereinabove written.

THE UNITED STATES OF AMERICA

Acting /s/ Ivan P. Head
Regional Director,
Region 2
Bureau of Reclamation

LOWER TULE RIVER IRRIGATION DISTRICT

By /s/ Anton Simonich
President

(SEAL)

Attest:

/s/ Frances M. Doyel
Secretary

APPENDIX K

September 5, 1945

REPORT ON WATER RATES STUDIES CENTRAL VALLEY PROJECT

I. Statement of Policy

1. The policy of the Bureau of Reclamation is to provide the widest distribution of the benefits of the Central Valley Project in order to achieve a full, sound development of the Central Valleys of California. The final goal of the Reclamation program is the creation of opportunities for the maximum number of successful farm families and the development of prosperous rural and urban communities through the maximum utilization of water resources for irrigation and the production of hydroelectric power. The attainment of this goal depends upon the extent to which the development of the family size farm can be encouraged. The provision of low flexible water rates and low power rates is the most tangible means of providing such encouragement and assistance, as it will:

(a) aid in the development of a stable farm economy,

(b) when combined with the effect of nondelivery of surface water to large holdings, promote the development of family size farm operations, and

(c) stimulate and make possible a greater diversification of Central Valley agriculture.

2. The water rate structure established for the Central Valley Project will probably be the most important

single factor determining the rapidity and type of development in the area. The present inflexible and, in most cases, higher water costs in the Southern San Joaquin Valley have resulted in farm failures in times of depressed agricultural prices and have discouraged the development of family size farms because of their inability to carry high water costs under adverse economic conditions. High, fixed power charges and the large capital investment required for expensive pumping equipment have necessitated a crop practice devoted to specialized high value crops or the planting of crops only during periods of high agricultural prices with the attendant risks; and have encouraged large holdings to reduce unit water costs. This situation emphasizes the necessity of a low water rate that can be varied according to the agricultural prices obtaining and the farmers' ability to pay.

3. Water users in many areas served by project irrigation facilities will continue to pump from replenished ground-water supplies to achieve efficient water use; other water users whose very location precludes the use of project water will of necessity continue to pump. Success for both types of operator depends to an appreciable extent upon the cost of the power available. The interdependence of low cost power and low cost water is obvious.

* * *

T.R. Thompson
Engineer

25, D.C.

The Secretary

of the Interior. OCT 10 1945

Sir:

The attached draft of long-term rental contract (Sg?.Draft 8-14-45; Rev. WO 9-27-45), proposed to be negotiated with the Southern San Joaquin Municipal Utility District on the Central Valley Project, is submitted for your consideration and, if found to be satisfactory, your approval as to form.

It should be noted that this is the first contract proposed under Section 9(e) of the Reclamation Project Act, 1939 (53 Stat. 1137) which provides in part as follows:

> "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary seems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. . . . "

It differs basically in principle from a conventional repayment contract for the repayment of project construction charges, among other things, in that the latter contemplates the acquisition of a permanent water right and the assumption by the contracting district, in such cases as a capital indebtedness, of a specific portion of the project construction cost and, in some cases, the District's ultimate assumption of the operation and maintenance of project works. Under the system the United States parts with and the water users acquire, permanently, to usufruct in the water and a beneficial interest in the project works. Under the attached long-term contract for furnishing of water, on the other hand, the usufruct in the water and the beneficial interest in the works reposes in the United States, subject to further disposition at the end of the contract term. Furthermore, the quoted section of the law does not contemplate that the entire project cost allocated to irrigation and reimbursable by the water users as construction charges, as in the case of a repayment contract made under other provisions of the law, need be realized within the maximum contract period of forty years. Another major difference is that the long-term contract provision requires payment of water charges in advance of delivery of water for each year.

Procedure under Section 9(e) is well adapted to a project of great magnitude and many unique problems, such as the Central Valley project. It presents the most practicable means in this case of attaining the objectives of reclamation and of obtaining the return of the Government's investment in the project allocated to irrigation. The considerable flexibility afforded by Section 9(e) of the Act, on which the attached draft contract is bottomed,

should tend to reduce to a minimum the need for resort to amendatory contracts and moratoria, such as is often experienced in the performance of conventional forty-year repayment contracts as the varying problems of water users are encountered over the years. While submitted in connection with the particular contracting district involved in the instant case, the attached draft, if approved, would serve as a guide to extensive negotiations to be pursued with other water users groups in the Central Valley.

In brief, the plan contemplated by the long-term water contract is this: The estimated available firm water supply of the project, for convenience referred to as Class 1 water, has been tentatively allocated quantitatively to the various areas involved in the project. Similar tentative allocation has been made of secondary water, referred to as that of Class 2, which is the water estimated to be probably available in varying quantities from year to year and which may be advantageously deployed principally to recharge depleted ground water supplies. Because of the wide fluctuations in the probable quantities of Class 2 water, it would be furnished only on the basis of if, as, and when available, as conclusively determined by the contracting officer. A maximum rate for each class of water would be fixed by contract with provision, however, that, within that maximum, the rate to apply in any year shall be that to be announced annually by the contracting officer.

This method of stipulating the water rate will provide a vehicle well adapted to meeting the varying conditions which may be expected to arise over the life of the long-term contract. Proposed water rates are derived

from studies and computations made in connection with the preparation of the cost allocation and repayment report mentioned in my memorandum of September 7, preliminary drafts of which report are now undergoing review in the Bureau.

Section 9(e) of the act cited contemplates that, in addition to the annual cost of operation and maintenance, the rates will reflect consideration of the par of cost of the works connected with the water supply allocated to irrigation. It is apparent from a review of the data assembled for the allocation report that the costs allocated to irrigation will approximate those that were considered in connection with the proposed maximum water rates. The cost allocation studies indicate that on rates and figures currently being considered, repayment of the costs allocated to irrigation will be attained in about 83 years. Should there be any material increase in the figures in the cost allocation studies, the result would merely involve a requirement for continuing the anticipated income from all sources for several additional years. Technically, and as a matter of chronology, it would be desirable that the cost allocation shall have been formally disposed of before execution of the proposed contract on behalf of the United States. Whether this will have been accomplished when the contract, if approved as to form, later reaches you for execution is uncertain. In any event the negotiation and execution of the contract by the district should go forward without delay particularly in view of the urgent need, concerning which I have already informed you, that water contract negotiations on the project be prosecuted vigorously at this time.

The factors controlling the determination of rates are (1) the requirements of Section 9(e) as discussed above, and (2) the ability of water users to pay. Studies already made show that the maximum rates fixed in the proposed contract have adequately resolved the latter factor. The "Report on Water Rates Studies Central Valley Project" and the Regional Operation and Maintenance Superintendent memorandum of May 29, copies of both of which are attached, and which should be returned for the Bureau's files, more fully disclose the method employed in determining the proposed water rates in relation to the ability of the water users to pay.

While great weight was given to the water users' ability to pay, other factors considered in arriving at the rate basis include the cost of water to the Government, vendibility, the contribution of power revenues, and the useful life of the project.

The attached contract undertakes to put into effect the principles outlined above. A sketch summary of its principal provisions, omitting reference to routine provisions common to most agreements with water users' organizations, is as follows: The term of the contract would extend from its date for a period of 39 years after the year of initial delivery of water (Article 10). In final negotiations with the District, the term may be reduced to some time less then that period. Under Article 11 the Government would be obligated to delivery, and the District to receive and pay for, 67,000 acre feet of Class 1 water each year, subject to the amount being increased to as much as 91,000 acre feet on action taken by the District within the first 15 years. That article provides also that there shall be furnished to the District as much Class 2

water up to 35,000 acre feet or 4.3 percent of the total delivered into the Friant-Kern Canal during the year, whichever is less, and a maximum quantity of 4,700 acre feet in any one month all if, as, and when available. The stipulated quantity of Class 2 water may be increased or decreased only on concurrence of the District and the contracting officer to lower or raise the ground water table underlying the lands of the District inasmuch as the primary use of Class 2 water, it is anticipated, will be for the replenishment of the ground water supply.

The matter of the control within the District of Class 2 water used for that purpose and that of the relationship of the beneficiaries thereof to the District involve somewhat novel aspects. However, I consider those matters as ones primarily to be worked out among the District and its landowners under local law. The United States, under the proposed contract, would look to the District, as a single entity, for payment for furnishing the water which the District would be obligated to receive and pay for.

Rates for each class of water would be announced each year within a maximum rate of $3.50 per acre foot for Class 1 water and $1.50 per acre foot for Class 2 water. Payments for water would be made in advance each year. (Article 12)

The ability of the Southern San Joaquin Municipal Utility District to pay the water charges contemplated by the contract has been thoroughly analyzed and I am convinced that the benefits to the lands of the District from the water service will enable the individual water users to pay the charges to be assessed, as outlined in the

proposed contract. The estimated average canal side benefit over a longer period of years from the delivery of Class 1 water is $6.77 per acre foot and, for Class 2 water, $4.57 per acre foot. The benefits to this particular District are somewhat higher than the average benefits for the entire service are of the Central Valley Project.

The average annual benefit from the water supply contemplated by the contract for new land to be irrigated on a long-term basis is estimated at $19.50 per act. The increased benefit on presently irrigated area which has a deficiency in water supply is $32.30 per acre. The power saved due to decreased pumping lifts resulting from additions to the ground water supply will, for the acreage to be served by ground water pumping, reduce costs an average of $7.35 per acre. The total benefit per acre for the entire District is $1,122,300 annually, or at the rate of $22.45 per acre. The net benefit annually, which is the total benefit less the cost of operating and maintaining the distribution system from the Friant-Kern Canal, is estimated to average $16.45 per acre or $4.85 per acre foot which is the amount available to meet the charges set forth in the contract. The annual ultimate project water cost to the District, based on the maximum rates proposed, would be $386,000, or $2.55 per acre foot on a weighted average basis.

Provision is made also for the advantageous scheduling of water delivery; adjustment of advance overpayments; the establishment of not exceeding four points of delivery; the responsibility of the District for distribution of water; safeguarding the United States in case of shortages due to certain causes (Article 1 and the obligations

of the United States under the contract would be conditioned on the completion by the United States of construction of the necessary works.

The contract does not contain a provision requiring the District to bring proceedings for the judicial confirmation of the contract. The California law under which the District is organized contains no provision for such confirmation. Unlike a contract for the repayment of construction charges, the proposed long-term contract does not come within the purview of the Act of May 15, 1922 (42 Stat. 541) relating the confirmation proceedings. (See 50 L.E. 142.)

In drafting the attached contract, although there is no requirement of the general Reclamation Law therefor, consideration was given to the possible inclusion of the so-called antispeculation or incremental value contract provision usually included as a matter of policy in contracts with districts for the repayment of construction costs. After much study of the matter those provisions were omitted from the proposed water contract. There are, as already mentioned, inherent differences between such a contract and one for the repayment of the construction cost and acquisition of a permanent water right. The incremental value provisions are not adaptable to a contract such as that proposed for furnishing water for a term of years only. For example, the incremental land value contracts contemplate application of the part of proceeds of land sales exceeding the appraised prices towards reduction of the landowners' project construction charges. The proposed contract for furnishing water for a term of years does not involve the payment of construction charges or the acquisition of a permanent or

any water right beyond the term of the contract. The payment, instead, is based on a charge per acre foot each year for the use of water. It would not be logical to require application of excess proceeds from land sales to the reduction of the District's annual indebtedness for the use of water. Furthermore, only about one-quarter of the land within the Central Valley Project is undeveloped land. The major part of all water to be furnished is for a supplemental supply. Finally, it is not anticipated that the added water made available to the project is going to cause any great speculative activity with respect to smaller units of lands. Experience in relation to the existing land provisions the Reclamation Law has indicated that it will be very difficult, if not impossible to obtain the execution of any contract with water users would require the execution of the incremental land contracts.

There have been included in the draft contract, however, appropriate excess land provisions, in form substantially the same as those approved by you on August 25. (Articles 25, 26, and 27.) Applicable law (Act of May 25, 1926, 44 Stat. 649) requires execution of a recordable contract at any time before actual delivery of water to excess lands. However, as indicated in your memorandum of August 15, it is desirable that there be fixed a definite, approximately uniform time within which such contracts shall be executed. To accomplish this the proposed contract (Article 27 (b) (i)) would require further that an excess land owner execute a recordable contract before the date fixed for initial delivery of water to the District or before the expiration of six months from the announcement of such date, whichever occurs first. The Secretary would be authorized to dispose of excess lands

on the failure of the owner to do so within ten years after the date of execution of the recordable contract.

Several provisions of the contract contemplate, in the course of its administration, recurring action by the contracting officer. When final execution of the contract is reached, I expect to recommend the delegation of most of those functions to me or, with my approval, to the Regional Director or other officer of the Bureau.

The proposed contract is in form satisfactory to me and I believe that in could the circumstances it represents the best approach to the marketing of the use of the Central Valley Project water supply. I recommend that you approve the attached contract as to form and the general policy and procedure which it embraces. This would serve as a guide for further negotiations with water-user organizations and in formulating other long-term water contracts prior to their submission to you for advance approval as to form.

Respectfully,

OCT 31 1945 /s/ [Illegible]
Commissioner

Copy to Actg. Reg. Dir.,
Sacramento, Calif.
Reg. Counsel, Sacramento, Calif.
Denver Office.

Approved:

(Sgd.) H.L.I.

Secretary of the Interior.
Enclosure 713.

25, D.C.

OCT 10 1945

MEMORANDUM for the Secretary.

It is proposed to negotiate with the Southern San Joaquin Municipal Utility District of California the Bureau's first long-term water contract under Section 9(e) of the Reclamation Project Act of 1939, in form of that attached. I consider this method of disposal of the water use for irrigation best adapted to a project of the magnitude and complexity of the Central Valley Project.

Disposal by the Government of a permanent usufruct in the water and its acquisition by the water users, together with a beneficial interest in the project works on assumption of a capital construction cost indebtedness under a conventional repayment contract, and the water users' mere conditional right of user for a term of years for annual payments in advance under the proposed long-term water contract, constitute the basic ones among several differences between the two types of contracts. Under the general plan, the firm water supply (Class 1) for direct surface diversion and the potential secondary supply (Class 2) which advantageously may be used for the needed recharging of ground-water sources for pumping, each has been allocated tentatively among various service areas.

Provision is made to furnish to the District for a period of approximated 40 years a stipulated quantity of Class 1 water and available Class 2 water, each at rates to be fixed annually within stated maximums which will

afford some flexibility in meeting future changing conditions. Ability to pay, as well as tentative cost allocation figures, largely influenced the formulation of the proposed maximum rates.

The need for proceeding vigorously at this time with the negotiation of contracts with water districts on the Central Valley Project is a pressing one.

The attached letter, with its enclosures, explains more fully the other principal provisions of the draft contract, and contains my recommendation that you approve the proposed contract as to form. It should be noted that there are included in this contract excess-land provisions substantially in the form of those approved by you on August 25.

/s/ [Illegible]
Commissioner,

Enclosure 870.

Copy to Denver Office.

Actg. Reg. Dir., Sacramento. Calif.
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APPENDIX L

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and WESTSIDE WATER DISTRICT

IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF CALIFORNIA

• • •

PETER D. PETERSON, et al. Plaintiffs, -vs.- UNITED STATES DEPARTMENT OF THE INTERIOR, et al.	Civil No. S-85-1644-RAR CONSOLIDATED Civ. No. S-86-238-RAR Civ. No. S-86-657-RAR Civ. No. S-86-882-RAR Civ. No. S-86-1030-RAR
AND CONSOLIDATED CASES	DECLARATION OF MARSHALL JONES

• • •

I, MARSHALL JONES, say and declare as follows:

From 1939 until 1953 I was an engineer employed by the Bureau of Reclamation. Since 1953 through the present I have been engaged as a consulting engineer and in that capacity have, among other things, advised districts throughout the Central Valley Project on, and participated in the preparation of P.L.-130 Loan Applications. Therefore I have remained familiar with the Bureau's policies and guidelines regarding such loan applications, loan contracts, payment capacities, et cetera.

During my career with the Bureau, from 1939 until 1948 I was employed in the Planning branch in the Sacramento office. From 1948 until 1953 I worked in the Chico District Office. For the first two and one-half years I was in charge of planning in that office, and for the latter two and one-half years I was the District Manager.

One of the major responsibilities of the Chico District office while I was there, and one for which I was personally responsible, was the Bureau's effort to gain the confidence of the farmers on the west side of the Sacramento Valley in the plans for the Corning and the Tehama-Colusa Canals. This required, among other things, that I meet with and address various groups, including landowners meetings, called at times at the Bureau's request, service and community groups, and county committees which had been formed of business and political leaders in the counties in the canal service area. I estimate that I presented the Bureau's plan and explained its requirements to such groups thirty (30) to forty (40) times.

My presentation consisted generally of an explanation of the manner in which the Bureau would sell water

from the canals. I knew that manner of developing, operating and administering this project would be essentially the same as the Bureau had done in the San Joaquin Valley some years earlier, for example, in the Friant-Kern service area.

I explained to the farmers that the Bureau would not contract directly with them for water sales, but instead they would be required to form districts. Their districts then would have to sign a contract to purchase water and in addition could contract with the United States for a loan for construction of distribution systems. (My presentations pre-dated the P.L.-130 Distribution System Loan Program and so these loans of which I then spoke were the so-called 9(d) program.) These loans were written with a ten-year development period, followed by a forty-year repayment of the loan amount, with no interest.

By far the two most critical issues to the farmers were the price of the water and the law on acreage limitation. I explained that the water price would be fixed in a forty-year contract. My recollection is that at that time the standard water rate was $2.50 although some few years thereafter the price was raised to $2.75. It is possible that even at the time that I was making these presentations, the price had been already fixed at $2.75, but I am certain that it was no more than that.

With regard to the acreage limitation, I described how that was enforced. Each individual was entitled to 160 acres of owned land, plus 160 acres for his or her spouse. In addition I told the farmers that it was possible for each of the their children to own 160 acres, if the title was properly placed in their names. There were many

people who farmed more than the 160-acre limit, and I explained that there was no limit to the amount of leased land on which they could farm. It is because leasing was not controlled that the provisions of the Water Service Contracts regarding any limitations on the delivery on project water are addressed only to lands owned within the district's service area, and there is no reference to leasing.

Many of the farmers with whom I met, but who ultimately had their lands included in districts to be served by the canal, were dubious of the project, and as I stated above, were particularly worried about the water price and acreage limitation. It is fair to say that the description of the Bureau's policies and contract provisions about these subjects were a major aid to me in overcoming their concerns.

In connection with the skepticism of the landowners, the following was important: (1) The great depression of the "30's" had ended and in the early 1940's thousands of farms had been foreclosed upon by the banks; (2) Only two irrigation districts in all of California had not defaulted on their bond financing due to the inability of the farmers to pay for water; and, (3) The then U.S. Senator Sheridan Downey and the then Irrigation Districts Association (now Association of California Water Agencies) were conducting an active statewide campaign highly critical of the Bureau of Reclamation's water contracts with particular emphasis on the acreage limitation terms.

Additionally, Congressman (later, Senator) Clair Engle personally attended several of these landowners

meetings. At the time he was the second ranking member of the House Interior and Insular Affairs Committee, and subsequently he co-authored the Bill which authorized the Corning and Tehama-Colusa Canals. The Congressman confirmed my explanation of these Bureau policies. He also frequently stated in the strongest terms that he would insure that the price for the water in the Sacramento Valley would be less than the Friant-Kern's water rate, $3.50 per acre-foot, because these lands lay so much closer to the source at Shasta Dam.

As I stated above, since leaving the Bureau I have been actively engaged in, among other things, the preparation of P.L.-130 Loan Applications on behalf of a number of different districts, including all three of Kanawha Water District's applications.

Any district's loan application must be based upon a demonstration that the district has the "payment capacity" to repay the loan at least within the maximum ten-year development period and a maximum of a forty-year repayment period.

The Bureau prepares the payment capacity studies and then provides them to the district and its engineers for use in writing an Engineering Report for a P.L.-130 loan application. The payment capacity is expressed in a number of dollars per acre and represents, as accurately as possible, an estimate of the amount of money which a landowner will have with which to pay *all* the assessments, charges and costs imposed by the district, including repayment of the loan, and payment of the district's contract reserves, O&M charges and water costs.

Examples of how the payment capacity and district's water costs as then reflected in a loan application are shown on the pages attached hereto which have been extracted from Kanawha Water District's Engineering Report for its P.L.-130 loan for Improvement District No. 2, dated March, 1975. An entire section of the Engineering Report (Section VII) is devoted to water costs. These are summarized and totalled in subsection D, and include repayment for the distribution system, the District's expected operation maintenance and replacement costs, and assessment for a reserve for drainage works, the cost of acquisition of pipeline right-of-way and the contract cost of the water. (Please note that the Engineering Report refers to the P.L.-130 loan project for Improvement District No. 2 as "Phase II". The references to "Phase I" are to data from the 1968 Engineering Report for the loan for Improvement District No. 1. There was also a third loan, in 1977 for Improvement District No. 3.)

The total annual cost of water for I.D. No. 2, based on the $2.75 contract rate then in force, was computed to be $35.86. The District did recognize that its water service contract provided for the *possible* increase of its water rate from $2.75 per acre-foot to $3.50 beginning in 1986. In fact the Bureau has raised the District's contract rate to nearly $5.00 per acre-foot, while there has been a catastrophic reduction in payment capacity. The Bureau's payment capacity study showed that the District, when fully developed for irrigated farming, had a payment capacity of $44 per irrigable acre. (The Engineering Report for I.D. No. 3's loan indicates that the Bureau's payment capacity studies were based upon 1976 crop income and expenses.)

Finally, a district's payment capacity relates to the length of the development and repayment periods for the loans. In Kanawha's case, for example, I.D. No. 1's loan allowed the legal maximum of a ten-year development and forty-year repayment period. Each of the loans for I.D.'s 2 and 3, however, obtained in years of improving farm profits, provide for shorter development and repayment periods.

Therefore, a district's contract rate for water is a critical interrelated element in the structure of its total financial obligations.

Once the applications are completed, they are approved by the Secretary of the Interior. Since the loan contracts are specifically conditioned upon appropriation of funds by Congress, it is incumbent upon the districts to make every effort to insure that those appropriations are made. In Kanawha's case, for example, the District sent one or more representatives every year that it required funds for construction of the P.L.-130 projects to address the House and Senate committees responsible for those appropriations. Each year Congress did make a specific appropriation for Kanawha's P.L.-130 projects.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on December 8, 1986, in Sacramento, California.

/s/ Marshall Jones
MARSHALL JONES

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

* * *

WESTSIDE WATER DISTRICT, et al,	Civil No. S-86-0657-RAR
Plaintiffs,	DECLARATION OF JOHN C. CAMPBELL IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION
-vs.-	
UNITED STATES OF AMERICA, et al,	
Defendants.	(FILED OCT 6 '86)

* * *

I, JOHN C. CAMPBELL, say and declare as follows:

1. I am a landowner in KANAWHA WATER DISTRICT. My property, which is approximately 320 acres

has been in my family since about 1890. I am also the Secretary-Manager of KANAWHA WATER DISTRICT, and prior to taking that position, I served on the District's Board of Directors from 1961.

2. Shortly after the District built its pipeline system to serve my land, I improved my property to change it from a dry-land sheep operation to irrigated farming. In the last few years I have had my property leased to tenant-farmers, but, because of the threat of enforcement of Section 203b in the District, to this date I have been unable to find a tenant for the 1987 crop year. Three potential tenant farmers have all turned me down. Tenants who can farm the types of crops which can be grown in our area that are most likely to return a profit cannot justify the financing for purchase of the specialized equipment necessary if they must limit their operations to less than 160 acres.

3. Moreover, the 960-acre limit available under the new law is of little or no assistance, because of the uncertainties of the annual adjustments in the Bureau's water rates. Under the District's water contract, this year the Bureau adjusted the water rate for "old law" farmers for the 1986-1990 period. The rate now is $4.78 per acre-foot. While this is within pennies of the so-called "full O & M" rate for "new law" (960-acre) farmers, the contract rate remains stable for at least five years. The full O & M rate, however, is adjusted every year. Last year, for example, the Bureau raised the full O & M price about 20%, five or six times the rate of inflation. Additionally, the "full cost" rate required by Section 203(b) is more than $35.00 per acre-foot in our District.

4. Most of the District's farmers rely on lenders for their operating capital. A farmer applies for a crop loan by presenting a budget detailing his estimated expenses and income, which must include his cropping plan. This is normally done sometime between early October and mid-December, and so tenant-farmers must have already made their lease agreements beforehand. The District is concerned though, because we are informed that one lender here has warned that *any* increase in the farmers' operating costs will result in a substantial number of them no longer qualifying for financing.

5. As I stated above, my family was among the original landowners who formed the District in 1954. This came about after the Bureau of Reclamation made a concerted effort, over a period of about 6 years to generate sufficient interest in this area to justify construction of the Tehama-Colusa Canal. At first the Bureau was met with a tremendous skepticism on the part of many landowners who had seen other irrigation districts in the Sacramento Valley default on their financial obligations, or take their farmers' lands for non-payment of assessments, only a few years before. There were many public meetings (and newspaper articles, written by the Bureau), to which the Bureau sent officials from its field office, then located in Chico.

6. These officials described the whole scheme of the project. They explained that it was first necessary to justify construction of the canal project to Congress by demonstrating that there were a sufficient number of acres of land willing to organize into districts to buy the water which would become available. The government would then make funds available for the districts to

construct their distribution systems, to be repaid over 40 years at no interest. The districts would be given water service contracts, also for a 40-year term, at a fixed water cost on which the districts and their landowners could rely in determining the extent of the financial obligations they would be assuming. Many of the landowners who would be in the new district were concerned about the acreage limitation law because they already owned or leased lands which received federal water in neighboring districts. The Bureau explained that the acreage limitation applied only to owned lands, on a district-by-district basis. There was no limit on the amount of land which could be leased. Under the new law the acreage limitation applied to 68th owned and leased lands, and the district is informed that rules will be written in accordance with a solictor's opinion that the acreage limitation applies westwide.

7. On the basis of the Bureau's representations, the landowners agreed to form the District, solely to be eligible to receive project water. Once formed, the District executed a water service contract which included these provisions.

8. Eventually we also entered into three separate loan agreements for construction of a pipeline distribution system in as many phases.

9. As required by state law, all the District's contracts were first approved by the Board of Directors, who must be landowners. The loan agreements were then submitted to a vote of the landowners, and passed overwhelmingly. The California State Treasurer approved every contract and they were each duly validated by judicial decree of the Superior Court.

10. Each of the District's loan applications include computations of the District's repayment schedule, which are prepared according to strict Bureau guidelines. The number of years the United States allows the District to repay its loan is based upon the District's "payment capacity," which is computed assuming a fixed water rate during the repayment period of no more than $3.50 per acre foot. In fact, the earliest loan (Exhibit 6 to the Complaint) is based on a $2.75 per acre foot price. As I stated, the Bureau has already raised the District's water price above those amounts, and, because the computations of payment capacity assumed much higher farm profits than are now the case, the District's farmers' financial situations are especially precarious. Many of these farmers are tenants who are able to survive only by farming enough acres to allow them to invest in the equipment which makes it possible to raise high value crops such as vine seeds, sunflowers, tomatoes or sugar beets.

11. In addition to my own experience as a landowner-lessor, I am aware of at least two other landowners who have reported that they are unable to find tenants to farm their land in 1987, because of the threat of the enforcement of Section 203b. There are also two landowners who have reported that some years ago they had entered into leases which will not terminate until 1990's. The terms of those leases were negotiated in reliance upon the District's loan obligations and contract rate for water. Those landlord-tenant relationships are now in jeopardy because of Section 203b. As I stated above, the District is also aware that the major banks who make operating loans to farmers in this area now view farming

in the District negatively because of the unknown cost factors arising out of Section 203b.

12. Because the lessors rely on tenants for the income necessary to pay the District's assessments to meet its loan obligations, we are most concerned that we will be unable to collect those assessments. This will lead to "tax sale" foreclosures on those lands. It will also make it impossible for the District to meet its financial obligations.

13. If the District can survive implementation of Section 203b, that law will have an adverse effect on the District's day-to-day operations also. We presently employ one fulltime clerical employee in the office, but we will be required to add at least one more to assist with the additional acreage reporting, record-keeping, billing and accounting which will arise out of the need to assemble and administer information on leased lands. Accounting for yet another water rate, required by Section 203b is itself a major problem. In the field, where we presently have a number of meter facilities which are shared between certain landowners or their tenants, we will be required to install additional metering facilities to insure that we can correctly account for water delivered to any tenants who might be subject to Section 203b. It should be noted that the original design and construction of the distribution system, including the number and location of the District's metering facilities, was approved by the Bureau, and was paid for with loan funds. Those loan funds are no longer available, however, to pay the cost of new installations.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on October 1, 1986, in Willows, California.

/s/ John C. Campbell
JOHN C. CAMPBELL

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

• • •

WESTSIDE WATER DISTRICT, et al,	Civil No. S-86-0657-RAR
Plaintiffs,	DECLARATION OF MARY C. WELLS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION
-vs.-	
UNITED STATES OF AMERICA, et al,	
Defendants.	(FILED OCT 6 '86)

• • •

I, MARY C. WELLS, say and declare as follows:

1. I am a landowner of 80 acres of property in the Westside Water District. This land has been in my family for three generations, but, until completion of the Bureau's Tehama-Colusa Canal, and the District's distribution system, we could only use the land to raise dryland grain, hay or cattle feed.

2. Like all other landowners in the District, I was required to enter into a long-term contract with the District for repayment of its debt to the Bureau of Reclamation, repayment of District bonds, and for purchase of water. This last agreement, which was based upon the District's own water contracts with the Government, promises water to my land at $3.50 per acre foot until 1995. The uses we had put our land to until that time

would not support repayment of those obligations. Therefore it was both necessary and to my benefit first to improve the land by leveling it in order that it could support irrigated crops, which have a much greater value than dry-land crops. I was able to finance these improvements by means of a 25-year, $40,000 loan from the Federal Land Bank.

3. Second, because I am neither experienced enough nor financially capable of raising those high value crops, I had to find tenants who were. My tenants now farm my property to a rotation of tomatoes, vine seeds and other row crops, which generate sufficient money for me to pay my indebtedness to the Federal Land Bank and to the District.

4. Because I have a relatively small acreage, my tenants could not justify economically the expenses involved in equipment, materials, et cetera to raise these high value crops, based solely on my 80 acres. Therefore they farm not only my property but other leased lands. If Section 203b is enforced, however, and increases the cost of water to my property, my tenants have informed me that they will no longer lease my property, but instead will shift their valuable tomato and seed contracts to lands which are not in a district served by federal project water. I will be forced back into the position of raising grains, hay or cattle pasture, but even if I irrigate those crops, they do not produce adequate income for me to meet the obligations I referred to above.

• • •

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct and that this Declaration was executed on September 30, 1986, in Williams, California.

/s/ Mary C. Wells
MARY C. WELLS

Supreme Court, U.S.
FILED
OCT 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-357

In the Supreme Court of the United States

OCTOBER TERM, 1990

PETER D. PETERSON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 203(b) of the Reclamation Reform Act of 1982, which requires that water users pay the United States the "full cost" for irrigation water assignable to lands leased in excess of a landholding of 160 acres and located within a water district that has not entered into a contract amendment incorporating the discretionary provisions of the Act, violates petitioners' rights under the Due Process Clause of the United States Constitution.

2. Whether Section 203(b) effects an uncompensated taking of petitioners' property in violation of the Fifth Amendment of the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-357

PETER D. PETERSON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A38) is reported at 899 F.2d 799. The findings of fact and conclusions of law of the district court (Pet. App. E1-E15) are not reported.

JURISDICTION

The decision of the court of appeals was entered on March 14, 1990, and amended on May 11, 1990. A petition for rehearing was denied on May 31, 1990 (Pet. App. D1). The petition for a writ of certiorari was filed on August 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Reclamation Reform Act of 1982, 43 U.S.C. 390aa *et seq.*, revised the federal reclamation laws, including the provisions limiting the size of landholdings receiving reclamation water and the pricing of such water. Water districts that had already entered into contracts with the government for the purchase of federal project water were not required to amend their existing contracts to conform with those provisions of the new statute. Section 203(b) of the Act provides, however, that where a water district does not, within four and one-half years after the passage of the Act, execute an amendment of its contract to incorporate the new provisions, "irrigation water may be delivered to lands leased in excess of a landholding of one hundred and sixty acres only if full cost * * * is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres." 43 U.S.C. 390cc(b). Petitioners contend that Section 203(b) violates due process and effects an uncompensated taking of their property.

1. The Reclamation Act of 1902, ch. 1093, 32 Stat. 388, created a federal program to encourage settlement of the West through the provision of irrigation water for arid lands. Congress specifically wished to encourage the establishment of modest sized family farms owned and operated by families that resided upon them. See, *e.g.*, 35 Cong. Rec. 1383, 6734 (1902). To achieve that goal, Congress limited the potential beneficiaries of the program and the size of the subsidy that they could receive.

Section 1 of the Act created a reclamation fund to be used "in the examination and survey for and the construction and maintenance of irrigation works for

the storage, diversion, and development of waters for the reclamation of arid and semiarid lands" in the western states. 43 U.S.C. 391. Section 2 authorized the Secretary of the Interior to carry out the activities described in Section 1. 43 U.S.C. 411. Section 4 empowered the Secretary, among other things, to determine the charges to be paid by the water users, such charges to be fixed "with a view of returning to the reclamation fund the estimated cost of construction of the project." 43 U.S.C. 461. The Act, however, did not provide for the return of interest on the government's construction costs.

Section 5 of the Act directly implemented Congress's intent to promote family farms, to spread widely the benefits of the reclamation program, and to prevent speculation. See H.R. Rep. No. 458, 97th Cong., 2d Sess. 8 (1982) (Pet. App. H1-H2). That provision states in relevant part:

> No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefore are made.

43 U.S.C. 431. Section 10 of the Act authorized the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect." 43 U.S.C. 373.

Congress subsequently modified the reclamation program created by the 1902 Act through the Recla-

mation Extension Act of 1914, ch. 247, 38 Stat. 686. Section 5 of that statute provided that, in addition to the construction charge, project participants would also be required to pay an operation and maintenance charge based upon the total cost of operation and maintenance of the project, or particular project units. 43 U.S.C. 492.[1] Thereafter, Congress enacted the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636. Section 46 of the 1926 Act generally provided that no water shall be delivered from any new federal reclamation project unless the Secretary of the Interior has entered into a contract with an irrigation district or districts organized under state law, which contract shall provide for payment by the district or districts of the cost of constructing, operating, and maintaining the project works. 43 U.S.C. 423e.[2] Section 46 further stated that such contracts shall provide:

> that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute

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[1] Under Section 6 of the 1902 Act, operation and maintenance costs had been paid from the Reclamation Fund until such time as the construction charges for the major portion of the lands within the project were paid. 43 U.S.C. 491, 498. See 32 Stat. 389.

[2] Prior to 1926, the Secretary of the Interior had entered into contracts directly with the individual water users.

> valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior * * *.

43 U.S.C. 423e.

Congress revisited the reclamation program in the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, 43 U.S.C. 485 *et seq.* Section 9(e) of the 1939 Act authorizes the Secretary to enter into either long- or short-term contracts to furnish water for irrigation purposes. 43 U.S.C. 485h(e). Such water service contracts shall be for periods not to exceed 40 years and "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." 43 U.S.C. 485h(e).

2. By 1979, the federal reclamation program was fully or partially supplying or supplementing the irrigation water supply to more than 6 million acres in 214 operating reclamation projects. S. Rep. No. 373, 97th Cong., 2d Sess. 8 (1982) (Pet. App. H43). The largest of these projects is the Central Valley Project (CVP), which was undertaken by the federal government upon the request of the State of California. See *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 280-283 (1958). In addition, the United States has also constructed, and provides irrigation water from, the Solano Reclamation Project in California. The Secretary has entered into long-term contracts with various water districts in the Central Valley and Solano areas for the delivery of irrigation water. The contracts, which state that they are

being executed pursuant to the federal reclamation laws (Pet. App. J3), are usually for a 40-year period and generally provide that the United States will deliver a specified amount of water (*id.* at J6). The price of water is generally set at a maximum dollars and cents price per delivered acre-foot of water for the duration of the contract. *Id.* at J9.

The contracts also include provisions intended to implement the excess land requirements. The contracts provide that the districts agree not to furnish water to any excess lands unless the owners have executed valid recordable contracts for the sale of such lands under the terms and conditions set out in the contract. Pet. App. J21-J22. The term "excess land" is generally defined to mean "that part of the irrigable land within the District in excess of one hundred and sixty (160) acres held in the beneficial ownership of any private individual, whether a natural person or a corporation." *Id.* at J24. The contracts further provide that if Congress repeals the excess land provisions of the reclamation law, the contract articles concerning excess land will no longer be in effect and if Congress amends the excess land provisions or other provisions of the reclamation laws, "the United States agrees, at the option of the District, to negotiate amendments of appropriate articles of this contract, all consistently with the provisions of such repeal or amendment." *Id.* at J26. The CVP and Solano contracts contain no mention of leased lands.

3. By 1982, a number of circumstances had brought increased attention to the federal reclamation program and led Congress to reconsider that program. First, the agricultural segment of the economy had changed vastly since the turn of the century. Many commenters asserted that, as a result of such

changes, the 160-acre land ownership limit established in the original 1902 Act "is not viable in today's economy and that it must be increased to provide a decent standard of living for reclamation land farmers." S. Rep. No. 373, *supra*, at 9 (Pet. App. H45). Second, because the purchase price of water from federal reclamation districts did not include any element of interest on the costs that the federal government incurred in constructing the project, such irrigation water is, in effect, subsidized by interest-free loans. See *Ivanhoe*, 357 U.S. at 295.[3] As the generally prevailing interest rates increased, the magnitude of the interest subsidy increased as well. Indeed, where long-term-fixed price contracts for the sale of federal irrigation water are in effect, such as in the CVP, the rates charged under such contracts were often no longer sufficient to pay even the operation and maintenance costs. Pet. App. E5.

The increasing extent of the federal subsidy, in turn, brought heightened concern that it be equitably spread to the maximum number of beneficiaries. See, *e.g.*, Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. (U. Colo.) L. Rev. 464, 491 (1960). It often appeared, however, that Congress's original goal of achieving the widest possible distribution of reclamation benefits was being frustrated. In particular, the excess land ownership provisions were being circumvented by the use of a variety of multiple ownership and lease arrangements. See 128 Cong.

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[3] In addition, Section 9(e) of the Reclamation Project Act does not require that the payments under contracts for sale of irrigation water fully return all of the allocated project construction costs. See 43 U.S.C. 485h(e). In the case of the CVP, it was recognized from the outset that the government would subsidize most of the allocated construction costs. See *City of Fresno* v. *California*, 372 U.S. 627, 631 (1963).

Rec. 16,297 (Sen. Lugar) (1982); *id.* at 26,076 (Rep. Miller). The Department of the Interior had never regulated the amount of eligible lands leased by any one landowner or operator and, consequently, it became possible for a single landowner or corporation to farm up to several thousand acres with subsidized water. In 1982, it appeared that three percent of the farming operations receiving reclamation benefits accounted for control of 30% of all of the irrigated lands in the program. *Ibid.* (Rep. Miller).

4. The Reclamation Reform Act of 1982 was enacted to provide, among other things, "a modern policy expression regarding Federal reclamation law." S. Rep. No. 373, *supra*, at 11 (Pet. App. H48). Several provisions of the Act are pertinent here. First, Section 204 provides that irrigation water may not be delivered to a "qualified recipient" for use in the irrigation of lands owned by such a recipient in excess of 960 acres. 43 U.S.C. 390dd. A "qualified recipient" is an individual citizen or resident alien or a legal entity that benefits 25 natural persons or less. 43 U.S.C. 390bb(9). A "limited recipient," which is any legal entity benefiting more than 25 natural persons (43 U.S.C. 390bb(7)), is subject to stricter limitations.

Second, Section 205(a) states that, notwithstanding any other provision of law, any contract with a district entered into by the Secretary shall provide for the delivery of irrigation water, in the case of a qualified recipient, at "full cost" to a "landholding" in excess of 960 acres for a qualified recipient. 43 U.S.C. 390ee(a). The term "full cost" is defined to include an interest element on construction costs as well as operation and maintenance deficits. 43 U.S.C. 390bb(3)(A). "Landholding" is defined as the "total irrigable acreage of one or more tracts of land situ-

ated in one or more districts *owned or operated under a lease* which is served with irrigation water pursuant to a contract with the Secretary." 43 U.S.C. 390bb(6) (emphasis added).[4]

Finally, Section 203 addresses the applicability of the various Reclamation Reform Act provisions to new, amended, and existing contracts. See 43 U.S.C. 390cc. Among other things, Section 203(b) makes Sections 209 through 230 of the Act applicable to all existing contracts.[5] Section 203(b) further provides that where an irrigation district does not within four and one-half years enter into a contract amendment incorporating all of the provisions of the RRA (including Sections 204 through 208), irrigation water may be delivered within the district to lands leased in excess of a landholding of 160 acres only if "full cost" is paid for such water.[6]

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[4] Section 205(b) states that contracts for the sale of irrigation water shall provide for the delivery of such water to lands not in excess of the "landholding" acreage limitations established in Section 205(a) upon terms and conditions under prior existing reclamation law. 43 U.S.C. 390ee(b). Section 208(b) further provides, however, that the price must be sufficient to cover the operations and maintenance charges as calculated by the Secretary and that the Secretary "shall modify the price of irrigation water delivered under the contract as necessary to reflect any changes in such costs by amending the district's contract accordingly." 43 U.S.C. 390hh(b).

[5] Hence, Sections 209 through 230 are sometimes referred to as the "mandatory" provisions of the Act, while Sections 204 through 208 (which include the limitation on ownership, pricing, and operation and maintenance charges provisions) are referred to as the "discretionary" provisions of the statute.

[6] Section 203(b) states in full:

> Any district which has an existing contract with the Secretary as of [the date of enactment of this Act] which

Thus, where a contract that incorporates Sections 204 through 208 of the RRA is in effect, a qualified recipient may own up to 960 acres of irrigable lands, and, where the lands owned or leased do not exceed 960 irrigable acres, the prices paid for federal project irrigation water will not reflect any element of interest upon the government's project construction costs. The price will remain subject, however, to periodic readjustment so as to assure reimbursement of Interior's project operation and maintenance costs. In addition, a project beneficiary may receive irrigation water for an unlimited amount of leased lands for landholdings that exceed 960 acres, but the government must then be reimbursed for the water assignable to the lands in excess of 960 acres at a "full cost" rate that includes an element of interest upon the allocated construction costs.[7]

> does not enter into an amendment of such contract as specified in subsection (a) of this section shall be subject to Federal reclamation law in effect immediately prior to [the date of enactment of this Act,] as that law is amended or supplemented by sections 209 through 230 of this title. Within a district that does not enter into an amendment of its contract with the Secretary within four and one-half years of [the date of enactment of this Act,] irrigation water may be delivered to lands leased in excess of a landholding of one hundred and sixty acres only if full cost, as defined in section 390bb(3)(A) of this title, is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres: *Provided*, That the interest rate used in computing full cost under this subsection shall be the same as provided in section 390ee(a)(3).

43 U.S.C. 390cc(b).

[7] The 960-acre figure applies to a qualified recipient. The corresponding figure for a limited recipient receiving irrigation water on or before October 1, 1981, is 320 acres. A

Where no amendment incorporating Sections 204 through 208 of the Reclamation Reform Act is executed, the government will continue to furnish irrigation water for use on operations not exceeding 160 acres at the price specified in the pre-1982 contracts, notwithstanding that the price may be insufficient to cover even the government's operation and maintenance expenses.[8] Similarly, Section 203(b) does not affect deliveries of irrigation water at the fixed contract price to all lands, including those in excess of 160 acres, *owned* by a landowner who has executed recordable contracts obligating him to divest himself of irrigable land in excess of 160 acres. Under Section 203(b), however, irrigation water may be delivered to lands *leased* in excess of a landholding of 160 acres only if "full cost" is paid for the water assignable to such leased lands.

5. Petitioners here are water districts, individual water users, and representatives of entities that receive irrigation water from the Central Valley and Solano Projects pursuant to water service contracts executed prior to the enactment of the Reclamation Reform Act. Petitioners initiated six suits in federal district court against the United States, the Department of the Interior, the Secretary of the Interior, and subordinate federal officials. The complaints alleged that the provisions of the Reclamation Reform Act requiring that water users pay "full cost" for

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limited recipient that was not receiving water on that date must pay "full cost" for the entire landholding. 43 U.S.C. 390ee(a).

[8] Entities within irrigation districts which have not entered into such contract amendments may nonetheless elect to bring themselves under all of the provisions of the RRA. Section 203(c), 43 U.S.C. 390cc(c).

irrigation water assignable to leased lands in excess of 160 acres and located within irrigation districts that do not adopt the specified contract amendments violate the Due Process Clause of the Fifth Amendment or, alternatively, violate the Takings Clause of the Fifth Amendment. The Natural Resources Defense Council intervened in the cases as a defendant. Pet. App. A5-A6, E1-E2.

The district court entered findings of fact and conclusions of law granting respondents' motions for summary judgment. Pet. App. E1-E15. Finding that "[t]he important social, political and ecological goals inherent in the legislation fully justify its enactment and any economic benefits to the United States which might result as a consequence of the legislation are merely incidental," the court ruled that the Reclamation Reform Act does not offend the Due Process Clause of the Fifth Amendment. *Id.* at E13. The court further concluded that the plaintiffs had failed to demonstrate an uncompensated taking of their property rights in violation of the Takings Clause of the Fifth Amendment. *Id.* at E13-E14.

6. The court of appeals affirmed. Pet. App. A1-A38. Stating that "[t]he first step in both due process and taking analysis is to determine whether there is a property right that is protected by the Constitution" (*id.* at A20-A21), the court reviewed the water districts' contracts with the United States to determine whether petitioners "have a constitutionally protected property interest in the delivery of subsidized water to leased tracts of any size" (*id.* at A21).

The court of appeals determined that petitioners do not have any such constitutionally protected right. The court gave several reasons for that conclusion.

First, the court found that although the federal reclamation laws do not expressly reserve a congressional right to amend the reclamation laws or contracts entered pursuant to those laws, this Court's decisions do not create "an absolute requirement that Congress expressly reserve in the controlling statute the right to amend the statute or governmental contracts entered under it." Pet. App. A24. Next, noting that the contracts themselves make no mention whatsoever of leasing, the court rejected petitioners' assertions that the contractual limitations upon the delivery of water to lands in excess ownership were intended to be the exclusive restrictions based upon the size of the individual water users' operations and, hence, create an implied contractual right to be free of any restrictions concerning the use of water upon leased lands. The court found that construction of the contracts unacceptable in light of the reclamation laws' statutory goal of promoting moderate-sized family farms and in view of the principle, as stated by this Court in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52-53 (1986), that government contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Pet. App. A24-A34. For similar reasons, the court ruled that petitioners' "investment-backed expectations" stemming from the absence of any previous federal regulation concerning leasing did not give rise to constitutionally protected rights. *Id.* at A34-A36.

Having thus found that petitioners "have no vested property right to buy reclamation water for delivery to leased lands" (Pet. App. A36), the court concluded that Section 203(b) does not offend the Due Process Clause nor does it effect a taking within the meaning of the Fifth Amendment (Pet. App. A36). The court

further held that "the Reclamation Reform Act is rationally related to a legitimate governmental purpose" because the Act and its legislative history show that "Congress's primary concerns were not with the federal budget, but rather, with the promotion of small farming operations, equitable distribution of water under modern farming conditions, and water conservation." *Id.* at A36-A37.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The questions presented in this case, which involve the scope of a subsidy enjoyed by a discrete number of geographically concentrated agricultural entities, do not raise an issue of national importance. Accordingly, further review is not warranted.

1. Petitioners contend that their water service contracts confer a vested right to utilize water at the fixed contract price upon an unrestricted amount of leased lands and that Section 203(b) abrogates this contractual right in violation of the Due Process Clause. As the court of appeals explained, however, the contracts are entirely silent concerning leasing. The water service contracts do not surrender Congress's power to act with respect to the sale of subsidized water from federal reclamation projects for use on leased lands.

a. This Court has held in cases involving governmental contracts that "contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Public Agencies*, 477 U.S. at 52-53. It has rejected the claim that a " 'sovereign forever waives the right to exercise one of its sovereign

powers unless it expressly reserves the right to exercise that power in' the contract." *Id.* at 52 (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)). Instead, any surrender of governmental regulatory authority through contract must be expressed in "clear and unmistakable" terms. *Merrion*, 455 U.S. at 148. Here, the contracts at issue contain no express surrender of regulatory authority with regard to leased lands—indeed, they contain no mention of leasing. Accordingly, the contracts do not by their terms surrender Congress's constitutional authority to restrict the use of federal project water on leased lands.

As the court of appeals recognized (Pet. App. A27-A30), this Court, in *FHA* v. *The Darlington, Inc.*, 358 U.S. 84 (1958), rejected an argument similar to that advanced by petitioners here. In *Darlington*, Congress enacted a mortgage insurance program with the aim of providing housing for veterans and their families. A corporation entered into a federal contract to obtain mortgage insurance, constructed an apartment house, and then rented some furnished apartments to transients—a use not expressly prohibited by the governing statute or agency regulations. Thereafter, in 1954, Congress enacted legislation expressly barring the rental of such housing units to transients. The corporation sued, asserting that the 1954 Amendment effected an unconstitutional infringement of its contractual rights. This Court ruled, however, that the plaintiff's expectation to continue to rent units to transients was "one that lies in the periphery where vested rights do not attach." *Id.* at 90. The Court noted that the 1954 Amendment applied prospectively only and that the corporation was not being penalized for anything it had done in the past. *Id.* at 91. The Court explained:

> The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning. Congress by the 1954 Act was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.

Ibid.

The Court's decision in *Darlington* is directly applicable here. Congress has acted prospectively to prevent the continuation of leasing practices that circumvent the intent, if not the letter, of federal reclamation law. Congress obviously may take action to prevent parties from manipulating a federal program to direct a federal subsidy from its intended beneficiaries to a select few. Petitioners' contracts contain no language waiving the government's authority to regulate leasing practices, and the court of appeals correctly declined to read any such implied waiver into those contracts. See *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 278-281 (1969); *American Hosp. Ass'n* v. *Schweiker*, 721 F.2d 170, 182-184 (7th Cir. 1983), cert. denied, 466 U.S. 958 (1984).

Petitioners contend (Pet. 6-8, 11) that because the water service contracts incorporate the excess land ownership requirements as they existed prior to 1982 and contain an article stating that the United States agrees, at the option of the districts, to negotiate contract amendments in the event that Congress repeals or amends those statutory excess land provisions, the contracts must be read as a surrender of the government's authority to regulate leasing. This contention

is unfounded. As petitioners themselves point out (Pet. 11), the excess land provisions incorporated into the contracts are framed exclusively in terms of land *ownership*. Section 203(b), however, does nothing to affect water deliveries on the basis of land ownership. To be sure, a landowner in the petitioner water districts may no longer *lease* lands in excess of 160 acres and receive water for such lands at the pre-1982 price. The contracts, however, contain no reference to the government's regulatory authority over the extent of leasing—they speak solely in terms of land ownership. Hence, the contracts fall far short of overcoming the presumption that contracts will be construed, if possible, to avoid foreclosing the exercise of sovereign authority.

Petitioners also assert (Pet. 12) that Section 203(b) is an abrogation of their contractual rights because the water service contracts provide for the delivery of water at a fixed maximum price and Section 203(b) requires that the United States be paid at a rate greater than the fixed contractual price for water used on leased lands in excess of 160 irrigable acres. Under its retained regulatory authority to further the essential purposes of the pre-1982 federal reclamation laws, however, the government could have precluded altogether the use of federal reclamation project water on land leased in landholdings in excess of 160 acres. Accordingly, the petitioners cannot justifiably complain that Congress decided to take the less drastic remedial measure of allowing water users to elect to utilize reclamation water on such leased lands, but at a price that reduces the amount of the federal subsidy with respect to such lands.

In summary, Congress retained the authority to regulate the use of water from federal irrigation

projects. "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Ivanhoe*, 357 U.S. at 296 (quoting *Wickard v. Filburn*, 317 U.S. 111, 131 (1942)). The water service contracts do not mention leasing. Hence, they cannot reasonably be construed as a "clear and unmistakable" surrender, *Merrion*, 455 U.S. at 148, of the government's regulatory authority to insure the wide distribution of the reclamation subsidy by limiting the amount of lands receiving subsidized water that a single landholding entity may lease. Accordingly, petitioners do not have a vested right protected by the Due Process Clause with regard to leased lands.

b. Even if the contracts could be construed as conferring a right to the delivery of subsidized water to leased tracts of any size, Section 203(b) would nonetheless pass constitutional scrutiny. The Contract Clause of the United States Constitution does not apply to the actions of the federal government. *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, 467 U.S. 717, 732 n.9 (1984). Rather, federal legislation affecting contracts is measured under the "less searching standards" of the Due Process Clause of the Fifth Amendment. *Id.* at 733. Indeed, even if a contractual impairment has been established, the courts will weigh the competing interests and may uphold a contractual impairment as outweighed by the public interest. "As with laws impairing the obligations of private contracts, an impairment [of a government contract] may be constitutional if it is reasonable and necessary to serve an important public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 (1977). A principal concern in such a balancing analysis is the degree to which the challenged legislation is "purely financial" in effect,

rather than serving broader social purposes. *Id.* at 24-25.

Contrary to petitioners' assertions (Pet. 17-18), the Reclamation Reform Act in general, and Section 203(b) in particular, were not enacted for purely financial reasons. As this Court stated in *Ivanhoe*, "[f]rom the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good." 357 U.S. at 292. The Reclamation Reform Act, including Section 203(b), was passed to further this policy in light of present realities.

The text of the Reclamation Reform Act, and its legislative history, demonstrate that Congress's primary concern was not the *amount* of the federal subsidy but, rather, its equitable *distribution* under modern-day conditions. This is perhaps best demonstrated by the new pricing provisions set out in Section 205 of the Act. Under those provisions, a qualified recipient may now obtain irrigation water for landholdings (owned, leased, or a combination of the two) of up to 960 acres at a price that still does not include any element of interest on construction costs and that, as based upon the pre-1982 law concerning return of allocated construction costs, will often fail to cover more than a fraction of the government's original construction costs. This provision thus closes the leasing loophole while retaining all of the construction cost subsidy elements of the pre-1982 reclamation law. Its primary thrust, accordingly, is to assure equitable distribution of the subsidy.

Similarly, the legislative history of the RRA indicates that Congress's essential concern was to assure equitable distribution of the subsidy under the con-

ditions now facing the agricultural sector, rather than simply to reduce costs. See H.R. Rep. No. 458, 97th Cong., 2d Sess. 10 (1982) (Pet. App. H4-H5); H.R. Conf. Rep. No. 855, 97th Cong., 2d Sess. 30 (1982) (Pet. App. H28-H29). Notably, the proponents of the bill did not frame their objections to the former leasing practices principally in terms of costs to the government. Rather, their primary concern was that equitable distribution of the subsidy was being frustrated through unrestricted leasing. See 128 Cong. Rec. 26,079 (1982) (Rep. Kazen).

As with the RRA in general, so with Section 203 (b) in particular. Contrary to petitioners' contention, the primary purpose of that provision is not to enrich the federal treasury. Rather, when viewed in the context of the entire Reclamation Reform Act and the federal reclamation laws of which it is a part, it is apparent that the overriding purpose of Section 203(b) is to assure fidelity to the longstanding federal objective of directing the delivery of federally subsidized water to smaller scale farming operations. To be sure, Congress could have adopter the more direct approach of simply prohibiting the delivery of federal project irrigation water to leased lands operated in units in excess of 160 irrigable acres and thus eliminated any colorable argument that Congress's motives were wholly financial. Congress, however, should not be faulted because, instead of wholly cutting off water deliveries to such lands, it elected to pursue the less drastic course of allowing water deliveries to continue but at a price that eliminates (or at least substantially diminishes) the federal subsidy.

In summary, even if Section 203(b) could be construed as an impairment of petitioners' contractual rights, that impairment would survive Due Process

Clause scrutiny because it is a reasonable and necessary measure enacted to serve an important public purpose. That important public purpose is to insure that the fundamental objective of a wide distribution of the reclamation subsidy is no longer undercut by large-scale leasing of lands benefitting from subsidized water.

2. For the same reasons that the water service contracts do not confer a vested property ri ht protected by the Due Process Clause, they likewise do not create any property right protected by the Just Compensation Clause of the Fifth Amendment. As discussed above, the contracts do not surrender Congress's regulatory authority to govern the use of federal project water on leased lands. Hence, Section 203(b) does not effect any taking of petitioners' property rights.

Petitioners' reliance upon *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), is misplaced. In *Kaiser Aetna*, the landowner held fee title to a pond. The Court held that the landowner's fee title included the right to exclude the public because that right is "universally held to be a fundamental element of the property right." *Id.* at 179-180.[9] Here, by contrast,

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[9] The landowner, with the knowledge of the Corps of Engineers, dredged a channel connecting the pond with a bay that opened on the Pacific Ocean. The government later asserted that the landowner had relinquished its right to exclude the public from the pond when it dredged the channel connecting it with public waters. This Court rejected that position, stating that "while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access." 444 U.S. at 172-173. This Court concluded that the claimed right of public access, which

the asserted contractual claim to purchase subsidized water from a federal reclamation project for use on leased-lands operations of unlimited size is far different from the "fundamental element" of the *Kaiser Aetna* landowner's property right to exclude the public from its private property. As we have explained, the right to obtain subsidized water from a federal reclamation project has been subject to conditions and restrictions from the inception of the federal reclamation program. In enacting Section 203 (b), Congress was exercising its "ordinary regulat[ory]" function (444 U.S. at 178) of ensuring attainment of the fundamental goals of the federal reclamation program, which goals include an equitable distribution of the benefits of the program among the recipients.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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would "result in an actual physical invasion of the privately owned marina," *id.* at 180, "goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking." *Id.* at 178.

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